No. 11013

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

L. G. TRULLINGER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 661 Howard Street, San Francisco

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

McDANNELL BROWN, F. E. WAGNER and ADAMS F. JOY,

Bedell Building, Portland, Oregon,

for Appellant.

NICHOLAS JAUREGUY, CAKE, JAUREGUY and TOOZE,

Yeon Building, Portland, Oregon,

for Appellee.

In the District Court of the United States
for the District of Oregon

No. Civil 2403

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

L. G. TRULLINGER,

Defendant.

COMPLAINT

Plaintiff, for a cause of action against defendant, complains and alleges that:

I.

Plaintiff, as Administrator of said Office of Price Administration, brings this action against defendant for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23, 50 U.S.C.A., Appendix 925/e/) hereinafter called the "Act".

II.

Jurisdiction of this action is conferred upon the Court by Section 205(e) of the Act.

III.

During the times herein mentioned there has been in effect pursuant to the Act, Maximum Price Reg-

ulation No. 136, as amended, establishing maximum prices for sales of tractors and other like equipment.

IV.

On or about the 7th day of April, 1943, defendant sold a certain tractor at a price higher than the maximum price provided for by said Maximum Price Regulation No. 136.

V.

The transaction referred to in Paragraph IV occurred within one year immediately preceding the filing of this complaint and said sale was not [1*] made for use or consumption other than in the course of trade or business.

VI.

Three times the aggregate amount by which the price charged by said defendant in the transaction herein referred to exceeded the maximum price as provided by said Maximum Price Regulation No. 136, as amended, equals the sum of Two Thousand Three Hundred Ninety-four Dollars ($2394.00).

Wherefore, Administrator prays judgment on behalf of the United States of America against defendant in the sum of Two Thousand Three Hundred Ninety-four Dollars ($2394.00), for plaintiff's costs and disbursements incurred in the prosecu-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tion of this action and for such other and further relief as to the Court may seem proper.

/s/ McDANNELL BROWN
/s/ F. E. WAGNER
Attorneys for Plaintiff

[Endorsed]: Filed March 24, 1944. [2]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL ANSWER

Comes Now the defendant whose true name is L. G. Trullinger and for his amended and supplemental answer to plaintiff's complaint, admits, denies and alleges:

I.

Defendant admits that this is an action for treble damages which plaintiff purports to bring under Section 205(e) of the Emergency Price Control Act of 1942, and denies the remaining allegations of paragraph I.

II.

Defendant admits the allegations of paragraph II.

III.

Answering paragraph III of said complaint defendant admits that at the times mentioned in the complaint there has been in effect a regulation known as Maximum Price Regulation No. 136, which has been amended from time to time, establishing maximum prices for certain types of machinery, and defendant denies the remaining allegations of paragraph III.

IV.

Answering the allegations of paragraphs IV, V, and VI, of said complaint, defendant admits that about the time stated in paragraph IV, defendant sold a tractor, and denies the remaining allegations of said paragraphs IV, V, and VI and the whole thereof. [3]

Further answering plaintiff's complaint defendant alleges that said sale was made in good faith and that if in said sale there was any violation of the Emergency Price Control Act of 1942 said violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

Wherefore, defendant having fully answered plaintiff's complaint, prays that plaintiff recover nothing, that said complaint be dismissed and that the defendant recover his costs and disbursements.

NICHOLAS JAUREGUY
CAKE, JAUREGUY & TOOZE
Attorneys for Defendant.

Due and legal service of the within Amended Answer by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 31st day of October, 1944.

/s/ ADAMS F. JOY
Of Attorneys for Plaintiff

[Endorsed]: Filed October 31, 1944. [4]

[Title of District Court and Cause.]

ORDER AMENDING TITLE

It having been stipulated in writing between the plaintiff and defendant, through their respective attorneys, that the designation of the defendant of the above entitled action be changed from L. B. Trullinger to L. G. Trullinger, the true and correct name of the defendant, now, therefore, it is

ORDERED

That the title in the above entitled action be corrected by changing the name and designation of the defendant to L. G. Trullinger, same being the true and correct name of the defendant in said action and all files and records in the said action are hereby corrected accordingly.

Dated this 6th day of November, 1944.

JAMES ALGER FEE
Judge

[Endorsed]: Filed November 8, 1944. [5]

[Title of District Court and Cause.]

PRETRIAL ORDER

A pretrial proceeding in the above entitled cause was held at Portland, Oregon, on the 16th day of October, 1944, before the undersigned, one of the judges of the above entitled court, and under the

direction of the court. At said pretrial proceeding the following proceedings were had to-wit:

I.

ADMITTED FACTS

(a) It is admitted in this case that this action is brought under Section 205(e) of the Emergency Price Control Act of 1942 (although defendant does not admit that plaintiff has the right to bring this action), and it is admitted that jurisdiction of this action is conferred upon the court by Section 205(c) of said act.

(b) It is also admitted that on the 7th day of April, 1943, there was in effect, pursuant to said act, maximum price regulation No. 136 as amended establishing maximum prices for certain types of tractors and other types of machinery.

(c) It is admitted that on or about the 7th day of April, 1943, the defendant sold a certain tractor to one Earl Gilmore. It is also admitted that the defendant received from the purchaser of said tractor the sum of $2,800.00 (defendant claiming that said sum included the purchase price of other articles of personal property). [6]

II.

ISSUES IN CONTROVERSY

The following issues are in controversy in this case:

(a) The plaintiff contends, but the defendant denies, that the particular tractor and other articles

of personal property which defendant claims he sold, were covered by said maximum price regulation No. 136.

(b) The plaintiff contends, but defendant denies, that the tractor was sold at a price higher than the maximum price provided for by said maximum price regulation No. 136. Plaintiff contends, that the correct ceiling price covering this sale was $2002.00.

(c) The plaintiff contends, but defendant denies, that said sale was made for use or consumption in the course of trade or business. In this connection, defendant contends that said sale was for the personal use of the purchaser thereof, and that such personal use does not constitute use in the course of trade or business.

(d) In the event the court finds that said sale was covered by said maximum price regulation No. 136, and that plaintiff has the right to bring this action and that the price at which defendant sold said tractor was higher than the maximum price provided by said regulation, the next issue presented is: What was the amount of said excess?

(e) In the event it is found that defendant violated said maximum price regulation and that plaintiff has the right to bring this action, it is contended by defendant, but denied by plaintiff, that said sale was made in good faith and that said violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

III.

EXHIBITS

The following exhibits have been produced by the respective parties, in each case exhibited to the adverse party, but with the permission of the court have not yet been marked as pretrial exhibits.

(a) Plaintiff produced as a pretrial exhibit "Collation No. 1, Office of Price Administration, Part 1390—Machinery and Transportation equip- [7] ment — Maximum Price Regulation No. 136 as amended—Machines and Parts, and Machinery Services", and copy of bill of sale from L. B. Trullinger to Earl Gilmore and with consent of defendant reserves right to produce original at trial.

(b) Defendant produced and exhibited to plaintiff two bundles of bills, invoices and similar documents covering repair parts.

The foregoing consists of the matters agreed upon at said pretrial conference and of the issues in controversy and said issues are to be tried and determined by the court in the above entitled action, and both parties have waived trial by jury.

The above entitled cause is hereby set for trial before the court without a jury for Tuesday, November 14, 1944, at 10:00 o'clock A.M.

Dated this 13th day of November, 1944.

CLAUDE McCOLLOCH

Judge

Approved:

/s/ ADAMS F. JOY
Of Attorneys for Plaintiff

/s/ NICHOLAS JAUREGUY
Of Attorneys for Defendant

[Endorsed]: Filed November 13, 1944. [8]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action was tried by the court without a jury, a jury having been waived, on the 13th day of November, 1944, starting at 1:30 P.M. Plaintiff appeared by his attorneys F. E. Wagner, Adams F. Joy and James A. Little, and defendant appeared in person and by his attorney, Nicholas Jaureguy (of Cake, Jaureguy & Tooze). Evidence was introduced on behalf of each of the parties and after having considered said evidence and the arguments of counsel, the court does now make and enter the following

FINDINGS OF FACT

I.

Jurisdiction of this action is conferred upon the court by Section 205 (c) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix Sec. 925 (c) and plaintiff contends that he has the right to bring this action pursuant to the provisions of Sec. 205 (e) of said act for an alleged

violation by defendant of said act, in that plaintiff contends that defendant on or about the 7th day of April, 1943, sold a certain tractor at a price higher than the maximum price which plaintiff contends is provided by Maximum Price Regulation No. 136.

II.

On or about the 7th day of April, 1943, defendant sold a certain tractor for the sum of $2,800.00. On said date there was in effect, pursuant to said Act, Maximum Price Regulation No. 136 as amended establishing maximum prices for certain types of tractors and other types of machinery. [9]

III.

The said sales price of $2,800.00 for said tractor was in excess of the maximum price provided therfor by said Maximum Price Regulation No. 136 in the approximate amount of $462.50.

IV.

The sale of said tractor was to one Earl Gilmore and said Gilmore was the ultimate consumer and said sale was made to him for use or consumption not in the course of trade or business within the meaning of the Emergency Price Control Act.

Based upon said above Findings of Fact the court makes the following

CONCLUSION OF LAW

I.

In said sale by defendant there was no violation by him of Maximum Price Regulation No. 136.

II.

Any right of action in connection with said sale is in said purchaser, Earl Gilmore, and not in plaintiff herein.

III.

Defendant is entitled to a judgment that plaintiff recover nothing and that his complaint be dismissed, and the court directs the entry of such judgment.

Dated this 6th day of December, 1944.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed December 6, 1944. [10]

In the District Court of the United States
for the District of Oregon

Civil No. 2403

CHESTER BOWLES, Administrator of the Office of Price Administration,

Plaintiff,

vs.

L. G. TRULLINGER,

Defendant.

JUDGMENT

The above entitled action having heretofore been tried before the Court without a jury, and the Court having heretofore entered its Findings of Fact and Conclusions of Law;

Now, Therefore, based upon said Findings of Fact and Conclusions of Law

It is hereby Ordered and Adjudged that the plaintiff recover nothing and that his complaint be and the same is hereby dismissed.

Dated this 6th day of December, 1944.

CLAUDE McCOLLOCH
Judge.

Due and legal service of the within proposed Judgment, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of November, 1944.

F. E. WAGNER
Of Attorneys for Plaintiff

EA

[Endorsed]: Filed December 6, 1944. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To L. G. Trullinger, Defendant Above Named and to Cake, Jaureguy and Tooze, His Attorneys.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment dismissing said action made and

entered in the above entitled action on the 6th day of December, 1944.

Dated at Portland, Oregon, this 23rd day of December, 1944.

(Signed) F. E. WAGNER
(Signed) W. DUNLAP CANNON, Jr.
Attorneys for Appellant
Chester Bowles, Administrator

[Endorsed]: Filed December 28, 1944. [12]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Plaintiff's Complaint
2. Defendant's Amended Supplemental Answer
3. Order Amending Title
4. Pre-Trial Order
5. Findings of Fact and Conclusions of Law
6. Judgment
7. Transcript of Proceedings of Pre-Trial Conference, Oct. 2, 1944.
8. Transcript of Trial Proceedings, November 13, 1944

9. Order to send all exhibits including Plaintiff's and Defendant's exhibits introduced in evidence, Nos. 1 to 3 inclusive.

10. Notice of Appeal

11. Order Extending Time to lodge record in Circuit Court of Appeals

12. This Designation of Record

Dated at Portland, Oregon, this 14th day of March, 1945.

/s/ F. E. WAGNER
Of Attorneys for Appellant

[13]

State of Oregon
County of Multnomah—ss.

Due and legal service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon, this 14th day of March, 1945, by receipt of a certified copy thereof.

/s/ NICHOLAS JUAREGUY
Of Attorneys for Defendant

[Endorsed]: Filed March 14, 1945. [14]

[Title of District Court and Cause.]

ORDER

It appearing necessary that the original exhibits in the above described case accompany the transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this court send the original exhibits numbered 1, 2 and 3 filed in this case, to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 19th day of March, 1945.

CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed March 19, 1945. [15]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter came on to be heard upon application of the plaintiff for an order extending the time within which to file its record on appeal and it appearing to the Court that plaintiff's Notice of Appeal was dated December 23, 1944, and was filed December 28, 1944, and it further appearing to the Court that said application for extension of time should be allowed, it is

Ordered that the time within which plaintiff has to file its record on appeal in the above entitled action be and the same hereby is extended for a period of thirty days from the 3rd day of February 1945 and to and including the 5th day of March 1945.

Dated this 30th day of January 1945.

JAMES ALGER FEE
United States District Judge

Approved:

NICHOLAS JAUREGUY
Of Attorneys for Defendant

[Endorsed]: Filed Jan. 30, 1945. [16]

[Title of District Court and Cause.]

EXTENSION OF TIME

This matter came on to be heard upon the application of the above named plaintiff for an order granting an additional extension of time within which plaintiff may file his transcript on appeal and it appearing to the Court that said application should be allowed it is

Ordered that the time within which plaintiff may file his transcript on appeal in the above entitled action be and the same is hereby extended for a period of twenty days from and after the 5th day of March, 1945, to and including the 25th day of March, 1945.

Dated this 2nd day of March, 1945.

JAMES ALGER FEE
United States District Judge

Approved:

NICHOLAS JAUREGUY
Of Attorneys for Defendant

[Endorsed]: Filed March 2, 1945. [17]

[Title of District Court.]

CLERK'S CERTIFICATE

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2403, in which Chester Bowles, Administrator, Office of Price Administration is plaintiff and appellant, and L. G. Trullinger is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause together with exhibits 1 2 and 3.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 19th day of March, 1945.

[Seal] LOWELL MUNDORFF
Clerk
By F. L. BUCK
Chief Deputy [18]

In the District Court of the United States
for the District of Oregon.

Civil No. 2403.

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

L. G. Trullinger,

Defendant.

Portland, Oregon, Monday, October 2, 1944.
10:25 o'clock A.M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Adams F. Joy, Attorney for the Plaintiff.

Mr. Nicholas Jaureguy, Attorney for Defendant.

Alva W. Person, Court Reporter.

PRE-TRIAL

Mr. Jaureguy: Your Honor, this is a pre-trial of a case of the OPA.

The Court: Are you going to call some matter?

Mr. Jaureguy: No, we don't want any time.

The Court: I mean now this morning. You have an OPA matter and I am rather prepared for what might happen.

Mr. Jaureguy: Well, I will merely say, this is an action for treble damages brought by the Ad-

ministrator and counsel has just offered to give me, or loan me, a copy of the regulation that was in force at the date of the sale. They have furnished all their regulations and they are all of later date, with amendments. So he is going to furnish me that, and he is going to underline these portions of it which are applicable to this case and which simplifies matters, I want to say, considerably to me, because I am having trouble with it and I don't have these transactions in the regulation.

It will be our contention at the trial that there wasn't any overcharge, on account of the fact that there were many additional parts that were given, and, therefore, when you take new parts that were given along with a tractor there were no additional parts and it came within the limits.

I might say that the defendant thought at the time that the—he hadn't read the regulations, but he thought at the time he was dealing with another provision of selling a guaranteed machine but he made the mistake of not giving the guarantee in writing, so the regulations require a guarantee must be given in writing. I think had it been in writing it would not have been over the ceiling, but he erred in giving it orally. [2*]

The other contention to be made at the trial is, this action is not properly brought. It is not an action by the Administrator but by the purchaser. Your Honor may recall, the purchaser, under certain circumstances, has the right. Under other cir-

*Page numbering appearing at top of page of original Reporter's Transcript.

cumstances the Administrator has. There have been decisions on this point and they are somewhat at variance. Two decisions I have run across are certainly in favor of the defendant in this case, and that is the Administrator has not the right to bring this action. However, I have run across one lately to the contrary.

So that will be I think the probable legal point in it, and that is about the size of it, so far as the defendant is concerned.

The Court: How much is involved?

Mr. Jaureguy: The alleged overcharge is about $800, and they are suing for treble damages.

Mr. Joy: If the Court please, Mr. Jaureguy has stated it is rather a simple case. I have two exhibits I would like to introduce, if I may. One is the regulation itself and the other is evidence of the sale of the tractor itself. I am introducing those two exhibits.

We contend the Administrator does have the right of action, inasmuch as there was no guarantee, in writing, as is provided to require that. Of course the sale was over the ceiling and the treble damage right is given in the Act itself. [3]

The Court: Well, you pleaded good faith under the amended statute, Mr. Jaureguy?

Mr. Joy: No.

Mr. Jaureguy: I don't know as my answer would be sufficient for that. The statute had not been amended. It just came to my attention about a week ago, the amendment to the statute. I will wish, however, in the pre-trial order to cover that,

unless your Honor thinks I should also file an amended answer.

The Court: I think you should. That is the practice in other cases—an amended and supplemental answer.

Mr. Jaureguy: Yes. Your Honor, prior to the filing, or the tendering of the pre-trial order, I will present an amended answer to show good faith. I understand of course from counsel about them. He has not stated today, but he discussed with me when I saw him before, that the Administrator does not have the right of action; that only the purchaser has the right of action.

Mr. Joy: Yes, your Honor. The Administrator has the right of action, we claim.

The Court: When would you like to try this case?

Mr. Jaureguy: I would like to try it before the latter part of this month, or any time after that would be all right.

Mr. Joy: Any time, your Honor, suits us.

The Court: November 14th? [4]

Mr. Jaureguy: November 14th is satisfactory to me.

Mr. Joy: That is fine.

Mr. Jaureguy: Now I have some exhibits here——

The Court: Suppose you just identify them between yourselves and with the Reporter.

Mr. Jaureguy: Yes. I would like to use them for the trial, and I would like also to have either the regulation to be used, or a copy of them.

The Court: Work that out between you. Mr. Joy knows the contents of them, doesn't he?

Mr. Jaureguy: The matter I have here is a mass of invoices showing the new parts he had purchased.

The Court: I will take this other matter up now.

(Thereupon the pre-trial hearing was concluded.) [5]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had upon the pre-trial of the case wherein "Chester Bowles, Administrator, Office of Price Administration," is plaintiff, and "L. G. Trullinger" is defendant, Civil No. 2403, heard October 2, 1944, before the Honorable Claude McColloch, Judge; that I have prepared a transcript of said proceedings, and the foregoing five pages, numbered 1 to 5, both inclusive, contains a full, true and correct record of said proceedings.

Dated at Portland, Oregon, this 28th day of February, A. D. 1945.

.....

Court Reporter [6]

[Title of District Court and Cause.]

Portland, Oregon, Monday, November 13, 1944
1:30 o'clock P. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Adams F. Joy and James A. Little, Attorneys for the Plaintiff.

Mr. Nicholas Jaureguy, of Attorneys for Defendant.

TRIAL PROCEEDINGS

The Court: Go ahead, Mr. Joy.

Mr. Joy: If the Court please, this case comes before the Court as a result of a crawler-type Allis-Chalmers tractor by the defendant to one E. Gilmore, at a price alleged by the plaintiff to be in excess of the proper ceiling price as [7] allowed by Maximum Price Regulation 136. The overcharge in this case is alleged to be $798, inasmuch as the correct ceiling price is $2002, and it is admitted its selling price was $2800.

The evidence will show that the tractor was sold in an as-is condition and not guaranteed.

If the Court please, I would like to move the Court for the admission of Mr. James A. Little, who is at my right, who is employed as an attorney at the Office of Price Administration. There is a written application for Mr. Little's admission.

The Court: All right. Mr. Jaureguy.

Mr. Jaureguy: If your Honor please, as Mr. Joy says, this case involves the sale of a tractor and it is contended by the OPA that the sale was beyond the ceiling price. We admit there was a tractor involved but that is all we admit.

In that respect our contentions are, first, that what was sold is not within the regulation itself claimed was violated; second, that there were other things sold besides the tractor; and, third, that if there is a cause of action that cause of action is in the purchaser and not in OPA.

I would like to elaborate a little bit on the first two of those points particularly.

Mr. Trullinger, who at that time had a sawmill in [8] Hood River and now has one in The Dalles, had purchased this tractor from a farmer sometime before that. In the summer of 1942 he put in many repair parts, and it so happens he didn't use the tractor much that year. The amount that he used it it would be estimated to equal about thirty day's use, so these repair parts had had very little use, and then in 1943 he determined to put in more parts so that when he came to use the tractor again it would be in first-class condition. So he purchased additional parts in 1943, and we will have an itemized statement of most of the parts, as far as the number of parts are concerned.

So far as another set of parts, they go to the track, what is known as the track. That is the thing that goes around. And he has shown what that cost him, about $250, being about $500 that he put in parts in 1943, which had not been used at

all, in addition to approximately what you would estimate to be the amount of labor to install them. So that he had a tractor here on which the ceiling price would have been 55 per cent of the new price, if he had not put any new parts in whatever.

Then he advertised it for sale and Mr. Gilmore came up from Dallas and looked at it, and all these new parts, of course they were not secondhand parts of secondhand machines; they were new parts; and so he sold it for $2800.

There was a misunderstanding—I can say this with [9] respect to the ceiling price; I have said to your Honor that a secondhand machine ceiling price is 55 per cent of the new price. Mr. Trullinger and I think Mr. Gilmore, too, were of the opinion that the amount of the new price on which that 55 per cent is based is of a machine delivered; that is, a machine to be bought in Hood River or The Dalles; that in the event by studying the regulation that the new price upon which the 55 per cent is calculated is f.o.b. factory. which of course is much different, but the parties here believed when they took the machine as it was and the new parts, that the price was about equivalent to a ceiling price. I may say that he sold not only the tractor but he sold two parts on the tractor, I think it is admitted by the OPA he could make an extra charge for.

Then he also sold all these used parts that had been taken out of the tractor. He also sold those. That is, he sold the new ones that had been put in the tractor and the old ones that had been taken

out, because they are of use to a person who has a tractor. Something goes wrong and he can't get new parts, he can use the old ones; so instead of having to sell the tractor, why, the tractor guard and the bull hook and parts that went in the tractor, although many parts, I may say, were duplicated, although I may say after Mr. Gilmore took the machine for some reason or other he never took the parts and I don't think it will be denied [10] those parts were part of the sale price.

So I think if your Honor finds that the sale of the tractor and the sale of the parts was within this regulation 136, that they claim was violated—and I am not going into that now, because it is just taking that regulation and going over, and over and over it —I think your Honor will find it was not, that the price which was charged for this merchandise was not in excess of the ceiling price.

Then the last point we make is that, if there was a violation, the right of action does not lodge with the OPA but the right of action lodges with the purchaser, the rule being as it existed at that time and as it now exists with respect to this transaction, that either the purchaser has a right of action for damages or the Office of Price Administration has a right of action for damages, but there is no duplication. The statute says that the purchaser has a right of action for the business for use or consumption other than in the course of trade or business, and that expression, use or consumption other than in the course of trade or business, has been con-

strued I think perhaps seven or eight times by various Courts, and I think that we will satisfy your Honor that most of the Courts have construed it to mean that a purchase for resale does not have a cause of action because he has purchased for use or consumption in the course of trade or business, but that a person who is [11] himself the ultimate consumer has not purchased for use in the course of trade or business but he has purchased for his own use, and I think it will not be disputed here Mr. Gilmore purchased this machine for his own use and for that additional reason we say that the plaintiff is not entitled to recover because any cause of action is not in the Administrator but in the purchaser.

Mr. Joy: Call Mr. Gilmore. Will you come up, please.

PLAINTIFF'S EVIDENCE

EARL GILMORE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Joy:

Q. Will you state your name to the Court, please? A. Earl Gilmore.

Q. And what is your business or occupation?

A. Logging.

Q. How long have you followed that?

A. Some thirty-four years.

(Testimony of Earl Gilmore.)

Q. On or about April 7th, 1943, did you purchase a crawler-type Allis-Chalmers tractor from the defendant, Mr. L. G. Trullinger?

A. Yes, sir.

Q. And what did you pay for that? [12]

A. Twenty-eight hundred dollars.

Q. Will you describe the tractor in this way?

A. Well, the tractor, in my own opinion, should mean, and the condition of the tractor was very poor——

Mr. Jaureguy: I move that that be stricken.

Mr. Joy: Just a minute.

Q. What kind of tractor was it?

A. Allis-Chalmers.

Q. Was it a crawler-type?

A. Crawler-type.

Q. What equipment did you receive in addition to the tractor itself? What extra equipment, if any, did you receive?

A. Well, there was one bull hook, one grease gun, and two wrenches for the cat.

Q. Did you compare the serial number which was on the bill of sale you received from the defendant with the actual serial upon this tractor?

A. I did.

Q. And it was the identical serial number?

A. Right.

Q. Do you know the horsepower of this machine when it was rated at the drawbar?

A. Supposed to be 50 horsepower.

(Testimony of Earl Gilmore.)

Q. What did you receive in writing, and what type of a written instrument, if any? [13]

A. Just a bill of sale.

Q. Was anything in the nature of an invoice given you, a written invoice?

A. Nothing.

Q. Now for what purpose did you buy this tractor? A. For logging.

Q. And did you use it for logging?

A. Very little.

Q. And why?

A. Because it was no good.

Q. Will you describe why it was no good?

A. It would not pull. There was water in the block. It was a cracked block. It would break the sleeve in two.

Q. How many times a week—how long did you use this for your purposes of logging?

A. Well, I imagine I did for three weeks, but I didn't log but actually one day.

Q. As the result of this condition you have described? A. Yes.

Q. How did that affect your business as to logging? A. Pretty much.

Q. Did I ask you how many years you had followed in the logging trade? A. Yes.

The Court: Q. Thirty years. [14]

Mr. Joy: Q. Thirty years?

A. Some thirty-four.

Q. You understand your business, then, do you?

A. I think I do.

(Testimony of Earl Gilmore.)

Q. Now as regards the actual sale, you remember the occurrence. Who was present?

A. Oh, me and my wife.

Q. And who else? You and your wife and who else? A. And Mr. Trullinger.

Q. The three of you? A. That is all.

Q. All right. At that time what price was asked? What price was asked at that time?

A. Twenty-eight hundred.

Q. And you paid the twenty-eight hundred dollars? A. I did.

Q. In Cash? A. In cash.

Q. What was said, if anything, relative to a guarantee?

A. He said that the price wasn't right to guarantee it. It wasn't enough money to guarantee the cat.

Q. Did you understand by that that if you had paid him more money he would have guaranteed it?

A. Possibly.

Q. In any event, your statement is now that he did not guarantee [15] it?

A. That is right.

Q. Did he affiramatively state that he would not guarantee it?

A. That is right. He said there was no guarantee with it.

Q. Did Mr. Trullinger at that time state anything to you relative to the mechanical condition of this tractor?

A. Yes. He said it was in pretty fair condition. He said he reconditioned it himself, although he said that there was a spark plug that wasn't working right, which was making it miss.

Q. Did you later determine whether that statement was correct? As a mechanical statement, I mean?

A. No. That statement wasn't correct. There was water in the——

Q. You have had considerable experience with mechanics, have you not?

A. I have, but I am not a mechanic, though.

Q. But you understand, do you not, the tractor had a cracked block?

A. That is right, yes. I had a mechanic look for me, too.

Q. Did you in this instance have a mechanic look into it? A. Yes, I did.

Q. Was it, in fact, a cracked block when you received it?

A. That is right. It must have been.

Q. And the mechanic told you that? [16]

A. Yes.

Mr. Jaureguy: Just a minute. I move that that be stricken—what the mechanic told him.

The Court: Stricken.

Mr. Joy: All right.

Q. Now you are following this logging industry, the business of logging, as a livelihood, aren't you?

A. That is right.

Q. And are you paid particularly? I mean, in

this operation in which you have attempted to engage with this tractor how are you paid? How do you receive your pay?

Mr. Jaureguy: I object to that as incompentent, irrelevant and immaterial.

Mr. Joy: Well, your Honor, I wanted to show what was interrupted, his line of work that was interrupted by the quality of this machinery he purchased.

The Court: Why? I am not in a hurry but I just don't see why you want to do that? If you want to do it bad enough I might let you do it. I just wondered why you want to do it.

Mr. Joy: Well, under this regulation, your Honor, I wanted to show that this was used in the course of trade and business. You know that is a phrase in the regulation I think on one side as contrasted with——

The Court: You might stand up and tell me what your construction of the regulation is. Mr. Jaureguy has told me [17] his construction of it.

Mr. Joy: Your Honor, if possible I should have answered Mr. Jaureguy.

The Court: Well, do it now.

Mr. Joy: It is our contention there are two types of sales, the retail sale, which I don't think I need to describe, or the wholesale type of sale, which is referred to in the regulation as the sale in the course of trade or business. The word "wholesale" is not used. By that the regulation, as we interpret it, means anything used for the purpose of making a livelihood, which is said to be in the course of

(Testimony of Earl Gilmore.)

trade or business. In other words, a retail purchase is something that you consume; it is consumer goods; whereas a purchase made for use in the course of trade or business, such as we claim a tractor to be for the purpose—and I was trying to bring out the same as his living that way; that is, something purchased in the course of trade or business we claim takes it out of the retail purchase. I don't like to say, common sense will tell you but the retail purchase is for consumer trade.

The Court: Who has the right to sue there?

Mr. Joy: The purchaser. After thirty days it is an alternative right that both the Administrator——

Mr. Jaureguy: That doesn't apply to this case.

Mr. Joy: I am wrong at that, your Honor. I wish to re- [18] tract that. Now at the present time that holds good but at the time of this purchase it lay only in the purchaser, if it were at a retail level. We claim, whether I am presenting it or not, that anything in the nature of a tractor, which was used in the industry, is certainly used in the course of trade.

The Court: Well, when did this happen?

Mr. Joy: The 3rd of April—7th of April, 1943.

The Court: Well, at that time wasn't there an option?

Mr. Joy: No. The exclusive right lay in the purchaser at that time. There is now an option after thirty days.

(Testimony of Earl Gilmore.)

The Court: Wasn't there something about fifty dollars? No; it was all in the purchaser.

Mr. Joy: Well, either way; either the overcharge of $50 or treble the overcharge.

The Court: What about all these secondhand sales that you are policing, the refrigerators and electric stoves?

Mr. Joy: Yes, your Honor.

The Court: And old luggage, and things like that?

Mr. Joy: That was a sale in what we call—that is a retail sale, your Honor, and you may sue for three times the amount of the overcharge or $50, whichever is the greater.

The Court: No. Some of these women around here are cleaning up a lot of their old stuff and you are checking on them all the time. [19]

Mr. Joy: That is right, your Honor.

The Court: They run an ad in the paper and say, "We have a waffle iron in good condition for sale," and they will get a telephone call from somebody and it will turn out that will be one of your investigators. They will say, "We have read the ad," but if they have been successful and sold that to some junkman he would come to their house and they get a price above the ceiling he would have had the right to sue there.

Mr. Joy: As of today, your Honor?

The Court: No; as of that date.

Mr. Joy: As of that date?

The Court: Yes.

(Testimony of Earl Gilmore.)

Mr. Joy: The right would lie with the junkman.

The Court: Well, what is the difference between selling a used refrigerator and selling a used tractor?

Mr. Joy: Because a used tractor is sold for the purpose of earning a living. That would be in the course of trade or business.

The Court: Well, in other words, if it had been a refrigerator of a commercial type you think the rule would be different?

Mr. Joy: I would say——

The Court: Or a butcher shop?

Mr. Joy: ——one of those would be all right. [20]

The Court: They don't have to be so big as that. Just think of two refrigerators now. They have commercial sizes and residential sizes. At the time you are talking about one of them was sold and so likely the right would have been in the purchaser; if a commercial type were sold the right would have been, by your argument, in the OPA, in the Government?

Mr. Joy: Well, I suppose that does reach a zero point somewhere.

The Court: I am just trying to get the distinction you make. Suppose this had been a 7-passenger automobile for pleasure purposes rather than a tractor?

Mr. Joy: That would have been a retail sale, your Honor.

(Testimony of Earl Gilmore.)

The Court: The right would have been in the purchaser?

Mr. Joy: That is right.

The Court: And if it had been a pickup for use in business the right would have been in the OPA, the same as you claim now for this tractor? I am just trying to get your distinction?

Mr. Joy: Yes, your Honor. I am going to try to answer it. It is getting pretty close.

The Court: I don't want to drag you away, other than close. I should think by your logic if you could say for this tractor you could say for the sale of a pickup truck to be used in the business.

[21]

Mr. Joy: I think a pickup truck is considered a truck as contrasted with a pleasure car.

The Court: That is the issue, isn't it, Mr. Jaureguy?

Mr. Jaureguy: That hits it pretty close, I think. I can give another illustration, however, if you will pardon me for interrupting.

Mr. Joy: Yes. I want to give one, too.

Mr. Jaureguy: Just as an illustration, one of the judges gave. I would like to use this one that one of the judges gave.

The Court: Does he have authority to support his views?

Mr. Jaureguy: Yes, he has some authorities, and I have authority, too. One of the judges uses this: If a man happens to use boots and he is a farmer, if he uses boots to go out hunting or around

(Testimony of Earl Gilmore.)

the place, he has the exclusive right of action, but if he uses boots in connection with his irrigation, or something of that kind, then he has no right and the OPA has the right of action.

The Court: The regulation has been changed, as I understand it?

Mr. Jaureguy: Only in this respect: The purchaser has the exclusive right, but if he does not exercise it within thirty days the OPA has the right.

Mr. Joy: That is right. The first thirty days it is the exclusive right, but after the first thirty days the [22] OPA has it. To determine whether it is in the course of business, if I may give an example to say some printer down here sells a printing press to another printer, it certainly could not be very different from a logger selling a logging tractor to another logger who was going to use it for exactly the same purpose.

The Court: If this transaction happened now to be actionable after thirty days the OPA would have the right of action?

Mr. Jaureguy: Yes, that is correct.

Mr. Joy: We claim, your Honor, in this case a purchaser would never have a right of action, because this is a sale in the course of trade or business, in which case it is only in retail that the purchaser ever has the right.

The Court: Not according to Mr. Jaureguy's contention.

Mr. Joy: I can't subscribe to that.

(Testimony of Earl Gilmore.)

The Court: You will subscribe to that if this happened: You would have a right of action for three times, and you don't agree here he would have it from today?

Mr. Joy: That is right. The purchaser would never have a right of action in retail purchase. I think there will be a slight difference in the number of days, but we are not going to——

The Court: Well, retail purchase is a treacherous term, isn't it?

Mr. Joy: Your Honor, if I am not repeating myself, we [23] look to the use largely, however, although it is formal in the case of a tractor that is being used for agricultural purposes, that we also claim is in the course of trade or business, because it is in the same general business. It is being used for the purpose of earning business or profit.

The Court: The distinction does not revolve around whether or not it is retail, does it, surely? Doesn't that confuse the question, to state it that way? Suppose he bought this tractor from a secondhand dealer in tractors and similar equipment, that would be a retail purchase?

Mr. Joy: The purpose for which it is used will be the test of use to which it is put.

The Court: The word "retail" does not come in at all in the discussion, does it?

Mr. Joy: I think it has no place in this case. It has nothing to do with this case. It is absolutely redundant, if that is the right word.

(Testimony of Earl Gilmore.)

The Court: Do you want to make a little contribution on this?

Mr. Jaureguy: I want to say when it comes to arguing this I want to go into it at some length.

The Court: All right.

Mr. Jaureguy: But the question now, if we may refer to that, before the Court, is not whether he used it in his trade or business but when he did use it, in whatever he [24] used it for, whether he lost money in using it, and I don't see how that has anything in the world to do with this case.

Mr. Joy: Oh, no. I am not contending that.

Mr. Jaureguy: You asked the question and I objected.

Mr. Joy: Your Honor, since Mr. Jaureguy has brought that up, I wanted to show it was due to the condition of the tractor he had to go out of that line of business, which he did.

The Court: All right.

Mr. Joy: The condition was bad. That was my point there.

The Court: He didn't use it in this case in his business, because he could not use it.

Mr. Joy: That is exactly it.

The Court: It was no good. That brings in another question.

Mr. Joy: Let me ask the witness something else in that respect.

The Court: He used it only one day, he thought —got only one day's use of it.

Mr. Joy: Q. Will you explain to the Court

(Testimony of Earl Gilmore.)

now the result upon your business of the condition of this tractor when you bought it?

Mr. Jaureguy: The same objection.

The Court: He may answer.

Mr. Joy: I want to bring that point up. [25]

Mr. Jaureguy: Well, it is not admissible.

Mr. Joy: I believe the Court ruled you may answer. Just explain to the Court about that.

The Witness: How was it you wanted?

Q. I wanted to know what effect upon the condition of your business, the condition of this truck had?

Mr. Jaureguy: The same objection.

A. It was pretty bad.

The Court: Did it put you out of busines, you mean?

A. It finally did put me out of business.

Mr. Joy: Q. About how long?

Mr. Jaureguy: I want the same objection. I don't think the Office of Price Administration ought to be trying to inject prejudice in these cases.

The Court: It won't prejudice me.

Mr. Jaureguy: I am not saying it will, but he ought not to be even trying it.

The Court: He may have a theory.

Mr. Jaureguy: He may have a theory, but I submit if he does have a theory it is very illogical.

The Court: He has a theory. He bought it for his business and he made such a bad deal he lost his business.

(Testimony of Earl Gilmore.)

Mr. Jaureguy: Another thing, it could not have been guaranteed to be in the condition it was. If it had been——

Mr. Joy: That is all right. No, that is not correct. [26] You can guarantee anything you want to. This witness has testified it was not guaranteed, and on that we will agree with him it was not guaranteed, in the sense he is talking about. He was given a guarantee but it was not in the sense he is talking about now—that is, an oral guarantee.

The Court: All right. Hurry up now. Now I am getting in a hurry.

Mr. Joy: Well, I guess that is about all we have. I believe that is all, your Honor.

Cross Examination

By Mr. Jaureguy:

Q. Now you say you bought what? What was it you bought from Mr. Trullinger?

A. A tractor.

Q. And what else? A. That is all.

Q. Well, you have already told us you bought a tractor, and a bull hook, a grease gun and two wrenches? A. Well, that was the size of it.

Q. Didn't you buy some armor?

A. Yes; the armor was on there, and the radiator guard, and a bumper.

Q. And you bought that and two wrenches. And did you buy anything else? A. No, sir. [27]

Q. Well, I want to hand you your bill of sale then? A. Well, what else?

(Testimony of Earl Gilmore.)

Q. Yes. I want to hand you your bill of sale and have you read that. Now that says armor, bull hook, wrenches, and miscellaneous parts?

A. Yes.

Q. What were those miscellaneous parts?

A. That is what I don't know. I didn't get them. You don't know what that had reference to?

A. I didn't get them.

Q. I am not asking you that. I am asking you if you know what that had reference to.

A. No, I don't.

Q. What is that?

A. I don't know what it has reference to.

Q. Did you have any discussion with Mr. Trullinger about these miscellaneous parts?

A. Well, I imagine the miscellaneous parts that he wanted me to take was the old sleeve, the old rails or old goughers that was fit for the junk pile.

Q. You say you imagine that. Where do you get that?

A. Well, he asked me if I wanted to take them and I said, "They are not worth hauling away."

Q. When was that bill of sale drawn up, before or after you had that conversation? [28]

A. After.

Q. And after you had the conversation, and when you saw that in the bill of sale did you have any discussion with him?

A. No, I don't know as I did.

Q. In other words, you didn't call his attention to the fact that there were things in there that you were not taking?

(Testimony of Earl Gilmore.)

A. I don't believe I did. We were in the bank at Hood River when this was made out.

Q. Now prior to that time had you discussed with him the new parts that he had put in the tractor? A. Yes, I believe we had.

Q. What is that? A. I think we had.

Q. There were quite a few new parts in it, weren't there? A. Not so many.

Q. What about the track?

A. Yes; there was new track, new rail.

Q. And the new track, as you know probably cost two hundred fifty, doesn't it?

A. I think I do.

Q. Yes. And what other parts did you discuss that were new?

A. Well, there might have been a new piece for the motor, but that is a very hard part to discuss —to determine whether it really was or whether it was the old one. There was an old one there, but that is a question. They may be twenty [29] years old or they may be six months old. That is a hard question to determine.

Q. Yes. Well then, what else did you discuss that was new?

A. Well, I don't think there was any other new parts.

Q. How did you arrive at this price of $2800?

A. In what way do you mean now?

Q. You had gone elsewhere, looking elsewhere for a tractor, too, hadn't you?

A. I had been, yes.

(Testimony of Earl Gilmore.)

Q. You had looked all over this state for a tractor?

A. Not too bad. No, no, not all over the state.

Q. Well, no, but in Polk and Washington and Multnomah?

A. Not very—not so much as that.

Q. And Wasco Counties? A. Oh, no.

Q. Well, you bought this in Wasco County? No; this was in Hood River County, wasn't it? Yes. And how did you arrive at a price? Was anything said about ceiling prices?

A. Yes. I asked him if he was within the price and he said he was.

Q. Yes. And did he tell you why?

A. No. We didn't ask that.

Q. Well, you knew about ceiling prices, didn't you?

A. Oh, I did in some ways, yes. He said he wasn't over the ceiling price. [30]

Q. And did he tell you why? A. No.

Q. Didn't he discuss with you what the ceiling price was? A. No.

Q. As he understood it, I mean?

A. We did not.

Q. And so you bought it for $2800, and you bought those articles that are mentioned in the bill of sale, except you didn't get the miscellaneous parts?

A. That is right. I didn't get no miscellaneous parts.

Q. Well, they were there, weren't they?

(Testimony of Earl Gilmore.)

A. They were no good to nobody.

Q. Well, if you will, just answer the question I ask you; then you can answer other questions.

A. I don't know whether they were there or not.

Q. Did you see them?

A. I don't know whether I did or not.

Q. Didn't you just get through telling us you saw them there?

A. Oh, yes, I seen these old sleeves and those old wires there.

Q. Yes.

A. What good would they do anybody?

Q. I don't know. I don't know anything about that line of business. Then you took it back to Dallas? A. Yes.

Q. And a few days later you went up to Oscar Hayter and [31] wanted him to sue for you, didn't you?

A. Oh, it was some time afterwards, not a few day.

Q. That is, you thought you had a cause of action? A. Huh?

Q. You thought you had a cause against him?

A. Well——

Mr. Joy: That is objected to as not proper cross examination.

Mr. Jaureguy: Well, it is proper cross examination as to whether he had it. In a way, that would indicate to him he did or did not have a case.

The Court: Go ahead.

Mr. Jaureguy: Yes.

(Testimony of Earl Gilmore.)

Q. That is, you thought you had a cause against him?

A. No. I don't know now as I ever mentioned it to Oscar Hayder much.

Q. Much? Well, I didn't say much.

A. Until along at the last part before Hayter died. Possibly there would have been a case if Hayter hadn't died.

Q. You mean on your behalf? A. Yes.

Q. That is, you had Mr. Hayter write a letter for you to Mr. Trullinger, didn't you?

A. I believe I did.

Q. Yes; in which you threatened to sue him?

[32]

A. (Witness nods his head.)

Q. Yes. That is correct? I don't know as the Reporter got your answer yet. Your answer was, "Yes," that you had threatened to sue him?

A. (Witness barely making a nod with his head.)

Q. Well, you don't know any more about the new parts that were there except the track and the sleeves, then? A. No.

Q. There were other new parts, weren't there?

A. No, there wasn't that I ever saw.

Q. What is that?

A. There wasn't that I seen.

Q. Well, the parts were inside, weren't they?

A. Well, how would I know whether they were inside or not? I couldn't see them.

(Testimony of Earl Gilmore.)

Q. Well, that is what I say. So that all you know about is the track and the sleeves, but as to other parts they might have been there and they might not? That is a fair way to say it?

A. Yes, that is a fair question.

Q. Yes. And a fair answer, too, isn't it?

A. Yes.

Mr. Jaureguy: That will be all.

Mr. Joy: I think that is all. Thank you.

(Witness excused.) [33]

Mr. Joy: Mr. McQuiston.

CLAUDE BYRON McQUISTON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Joy:

Q. Please state your full name to the Court.

A. Claude Byron McQuiston.

Q. Your occupation, please?

A. Assistant Manager for Allis-Chalmers Manufacturing Company.

Q. How long have you worked for the Allis-Chalmers people? A. Oh, since 1931.

Q. During that period of time have you worked with a big family, with tractors and the prices thereon in general?

(Testimony of Claude Byron McQuiston.)

A. I have to do with the settlements and——

Q. Sales?

A. ——accepting orders and filling orders for dealers, et cetera.

Q. And you are familiar with the types and prices? A. Of various models, yes, sir.

Q. Are you familiar with a certain tractor described as WK03982 Serial Number, which was sold in 1935, in June of 1935?

A. We have a record of such a sale in our office.

Q. Have you with you the data with which you can give us the drawbar, pull, and so forth, of this tractor? [34]

A. I have the catalogue here with specifications in it.

Q. Will you get that, please. Will you give us the drawbar horsepower of this particular tractor?

A. WKO gives the horsepower at the drawbar 49.58.

Q. And at the belt?

A. Belt horsepower 57.99.

Q. The number of clyinders?

A. Four cylinders.

Q. Fuel used? A. Diesel oil.

Q. Type of ignition?

A. Spark plug ignition.

Q. The weight?

A. The shipping weight approximately 11,425 pounds.

Q. How many transmission speeds forward?

A. That particular tractor had eleven forward.

(Testimony of Claude Byron McQuiston.)

We built that tractor with three speeds and another at four speeds. This one——

Q. Yes. Did you finish? A. Yes.

Q. What was the nearest in your equipment power to this?

Mr. Jaureguy: Objected to as calling for the opinion of the witness.

The Court: Answer.

A. Comparable in horsepower would be our gasoline model WK. [35]

Mr. Joy: Q. Will you give us the drawbar horsepower again?

Mr. Jaureguy: Will you give us that model again?

A. WK. That is the gasoline. The drawbar horsepower 55 even.

Mr. Joy: Q. Belt horsepower?

A. The belt horsepower is 63.96.

Q. Cylinders? A. Four cylinders.

Q. Fuel used? A. Gasoline.

Q. Type of ignition? A. Spark plug.

Q. Weight?

A. Shipping weight described in our price manual here includes dunnage 12,040 pounds.

Q. Transmission speeds forward?

A. This late literature I have here shows four speeds now. I am not certain what——

Q. Selling price?

Mr. Jaureguy: Just a minute. He didn't finish that.

Mr. Joy: Go ahead.

(Testimony of Claude Byron McQuiston.)

The Witness: I am not sure whether that price at that time was with four speed or three speed. At the time——

Q. Was it put out in both?

A. That is what I can't say offhand here.

Q. Well, the other one that you compared with this was put [36] out in both three and four, was it not? A. That is true.

Q. And this one you are not sure? A. No.

Q. Selling price, please, on this last one?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial, on the ground it cannot be equivalent, since one is Diesel and one is gas.

Mr. Joy: The most nearly equivalent, your Honor, was my question—the most nearly equivalent tractor on the market at the time.

The Court: At the time of the sale to Trullinger?

Mr. Joy: Yes, that is right.

Mr. Jaureguy: I object on the ground one is Diesel, the other is gas.

The Court: You may answer.

Mr. Joy: They are still the same as the other.

Q. Please give the price of this last one, the WK model. A. WK?

Q. F.o.b. factory, please?

A. $2880 at the factory.

Q. $2880? A. $2880.

Q. And I didn't ask you the selling price of the first one. Will you give me that WKO3982, the first one, the one which [37] is involved in this trial?

A. The price list I have is dated April, 1936.

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Your Honor, I will object to it, then.

The Witness: And the catalougue number bears the same.

The Court: Why are you bringing that up?

Mr. Jaureguy: Because that is the price of 1936 and the question is the price of April, 1943.

Mr. Joy: I am trying to determine the most nearly comparable tractor, your Honor.

The Court: Well, why do you want the price in '36 of anything?

Mr. Joy: I don't. You see, I am trying to determine as nearly as I can the price of a tractor which had gone out of production at the time the sale was made.

The Court: Yes.

Mr. Joy: I am trying to establish a price, because I can't use that price. They didn't manufacture it, and this man is going to, I hope, show, your Honor, the nearest to that, and we are going to take that price.

The Court: Yes.

Mr. Joy: If it is satisfactory. Your Honor, my colleague suggested something—I may not have made it clear: On October 1st, 1941, which is the date when tractor prices were frozen, we had not this tractor involved in this case selling new. In order to get an intelligent selling price [38] we have to take the nearest comparable tractor, which incidentally is provided for in the regulation—the nearest comparable tractor at that time, and this man is

(Testimony of Claude Byron McQuiston.)

in a position to know the nearest comparable tractor. I am trying to bring that out.

The Court: Yes, but why do you want the price in '36?

Mr. Joy: No; nothing, your Honor.

The Court: That is what we are talking about.

Mr. Joy: Oh. That is right. I had forgot to ask the question.

Q. On October 1st, 1941, was the WKO, the Allis-Chalmers crawler-type tractor, WKO model, in production at the factory? A. In 1941?

Q. Yes. A. No.

Mr. Joy: I had forgotten to ask that question.

Q. At that same date, on October 1st, 1941, you had no factory price of this model WKO involved in this suit? The Allis-Chalmers people were not publishing lists, selling prices, on the tractor involved in this suit, which I know you are familiar with, in 1941; is that true?

A. The tractor was out of production. The price list was taken out of our books.

Q. That is the point I was trying to make. Would you state the cost of the guard crankcase on the WK model as compared [39] with the same crankcase guard on the WKO model? Would you just state the comparison of those models?

A. They are identical.

Q. All right. That is what I was trying to get at. In other words, is this true: That the parts for the WK model, which is the latter one that you

(Testimony of Claude Byron McQuiston.)

just described, and the WKO model, are interchangeable. A. They are interchangeable.

Q. Now have you the lowest prices before you there of the crankcase guard? A. I have.

Q. Will you state that now. And we will try to go through this in a hurry.

A. We have a combination of prices, I might explain here, dependent upon getting complete guards, or one only. If a person asks for a complete set we must have a starting place or a base price for the balance of the guards to attach to it, you understand.

Q. Very well.

A. First, we start with a crankcase guard, which has a list price of $45.00.

Q. All right. Radiator guard?

A. A radiator guard $22.50.

Q. And bull hook?

Mr. Jaureguy: Now I didn't get that first guard. That [40] was the crankcase guard. Is this for ours or for the ——

Mr. Joy: Yes. They are interchangeable. I am allowing you to claim—I am allowing you for all of this.

Mr. Jaureguy: Crankcase guard?

Mr. Joy: Yes.

Mr. Joy: Crankcase guard forty-five, radiator guard twenty-two fifty, and did you state the bull hook?

A. That is not a bull hook, as I understand you to call it. It is pull hook, front pull.

(Testimony of Claude Byron McQuiston.)

Mr. Joy: Oh. Excuse me. I misunderstood it.

Mr. Jaureguy: Your letter says bull hook. It is a pull hook?

Mr. Joy: Maybe it is.

Mr. Jaureguy: That is what the locals call it.

Mr. Joy: Whatever it is.

The Witness: We supply a front pull hook at seven fifty.

Q. Is that satisfactory?

Mr. Jaureguy: No. Your letter says $25.00 is what you allowed for that, for the bull hook.

Mr. Joy: Well, let's pass that. I will stand on what the letter said that we sent out.

Q. The bumper guard? Is that a bumper or a bumper guard? A. A bumper.

Q. A bumper. All right. [41] A. $17.50.

Q. All right. The 18-inch shoes, the wide shoes?

A. Assuming that—I will have to answer a question here because if you are to put on 18-inch shoes straight out of our repair department it varies. Then if you bought a standard equipped to 15-inch equipment and 18 is involved, 15 is standard equipment.

Q. To give them the advantage of that, give us the price of 18-inch shoes in the condition they had been changed. A. Adding 18-inch shoes?

Q. Yes, that is right. A. $294.

Mr. Joy: I think that is all, Mr. Jaureguy.

(Testimony of Claude Byron McQuiston.)

Cross Examination

By Mr. Jaureguy:

Q. I don't suppose that you would have any record of inquiries by the OPA heretofore as to the list price on this particular tractor?

A. We have inquiries practically every day from various parties asking prices on our equipment.

Q. Yes. I think probably Oscar Hayter and the OPA both asked you, from the information I have. I am just asking you this to see if there is anything there that fits it other than a list price of $3723. Do you have anything that hits that list price of a tractor that might be comparable? [42]

A. Thirty-seven hundred?

Q. Thirty-seven hundred twenty-three dollars.

A. I haven't anything at that figure. I could possibly make it up by various——

Q. What is that?

A. Adding various equipment I might make such a price possible. I have no such figure at that in my figures.

Q. Now what is the difference, generally speaking, of two comparable engines, one of which is gasoline and the other of which is Diesel?

A. Assuming they are talking about the same horsepower?

Q. Yes. As near as possible, yes.

A. It so happens that the Model WK and the WKO are one and the same tractor, with the exception of the motor.

(Testimony of Claude Byron McQuiston.)

Q. Yes. One is Diesel and the other is gasoline?

A. One burns Diesel oil and the other gasoline. I would not call it a Diesel tractor.

Q. What is that?

A. We call it an oil engine WKO.

Q. But isn't a Diesel engine much more expensive than a gasoline engine?

A. Very much so.

Q. And about how much would you say on an engine for a 50 horsepower tractor? What would be the approximate difference between the cost of a gasoline and Diesel engine? [43]

A. Would you like to know the price of the present Diesel we are making now in place of the WKO?

Q. Yes. A. Forty-two hundred fifty.

Q. For the engine or do you mean for the tractor?

A. That is full new tractor, full Diesel tractor.

Q. You say that is in place of a WKO?

A. That has replaced the WKO and the WK gasoline.

Q. Well then, what is the difference between the present one? What did you say that price is?

A. Our new tractor is $4250 at the factory.

Q. $4250 at the factory. And how long have you had that one?

A. Oh, I would say about three years.

Q. And what is the difference between that tractor and the WKO?

(Testimony of Claude Byron McQuiston.)

A. It has a full Diesel motor in it.

Q. Wasn't the WKO a Diesel motor?

A. It burned Diesel oil but it was an oil-burning tractor motor, not a full Diesel.

Q. What is that?

A. It was not a full Diesel engine.

Q. I am a little ignorant of some of these technical terms, you know.

A. Well, a full Diesel engine does not use spark plug ignition.

Q. Oh. [44]

A. It explodes the fuel oil by compression and we use spark plug ignition in the WKO oil burner.

Q. But they both burn Diesel oil?

A. Correct.

Q. Well, why, then, do you say that replaced the WKO?

A. That is, the present tractor we are using now as the Diesel.

Q. To replace WKO? Didn't you say that that is what you are now selling is replacing the WKO?

A. In that size tractor, yes.

Q. If somebody came to you and said that he had a WKO and he liked it and wanted something that you would recommend to take the place of it, this is the one you would recommend?

A. Immediately I would think of the horsepower in both and get the new tractor.

Q. Yes. And this is the one you would recommend, of forty-two hundred?

A. That is true.

(Testimony of Claude Byron McQuiston.)

Q. That is the list price, I take it?

A. At the factory.

Q. At the factory. That tractor, that $4220 tractor, is the one that would come to your mind first before this gasoline engine one that you have been describing to Mr. Joy; isn't that right?

A. The gasoline engine was out of production.

Q. Oh, the gasoline engine one is out of production? [45] A. Correct.

Q. And this Diesel burning one has replaced both the gasoline and the WKO?

A. That is the only size we have in that horsepower arranged.

Q. And how long has the gasoline one been out of production?

The Court: Two years.

Mr. Jaureguy: Two years.

The Witness: It was taken out about a year and a half or two years ago, I would judge.

Q. Two years?

A. These dates here, May 31, 1943, discontinued, it shows in my book here.

Q. The book is dated you say May 19th?

A. This sheet is my price sheet and shows the model discontinued as of that date.

Q. Well, what does it mean, model discontinued?

A. They could have had a surplus built up in inventory but we could no longer quote the prices on WK because there was no more available.

(Testimony of Claude Byron McQuiston.)

Q. You don't know, then, how long prior to that time they had been selling at the factory?

A. I wouldn't know.

Q. What I mean to say is, you don't know whether you sent any orders two or three or four months before that to find out the factory didn't have them? [46]

A. Not until that time we received that; not until we had occasion or would have sent an order in requisition for one.

Q. Yes, but I say you don't know now whether during the two or three months before you got that sheet you sent any orders and discovered they didn't have any? You can't tell that, as I understand it?

A. Let me get your question right now?

Q. You couldn't tell us when is the last time that you sent in an order for that gasoline engine and discovered that they didn't have any at the factory to sell?

A. I haven't any record here with me, no.

Q. Now what is the difference between, as near as you can give it to us, say between the F.O.B. factory prices and the delivered price at Hood River? Could you give us some idea on that?

A. It varies considerable.

Q. Yes.

A. On account of method of shipments.

Q. Yes.

A. If it is possible to have at least five tractors on a car the freight is much reduced, more than if

(Testimony of Claude Byron McQuiston.)

it comes one tractor or two tractors on a car, or is shipped singly by forwarding freight. The cheapest method of course is carload rates.

Q. But it varies a lot, you say. What would you say a single shipment would be? Can you give us some idea? [47]

A. Yes. At the present time under O.D.T. Regulation a single shipment, it would cost in the neighborhood of $500.

Q. Now this gasoline is $2880 at the factory? That is the lowest price?

A. That is it, the lowest price I had.

Q. That is the lowest price you had, but you can't tell us when it was you were sellin git at that?

A. Yes, sir.

Q. What is the lowest price you had on the WKO at the factory?

A. As near as I can tell, that is the lowest prices I have, rather, or the earliest, whichever you wish to call it—this one I have with me here, which is 1936.

Q. Oh. Could I see that?

A. Certainly. I may have to explain it to you.

Q. Well, I dare say you probably will. What would you say was the description of this gasoline, the one that you were describing to Mr. Joy?

A. The gasoline?

Q. Yes. What did you call that?

A. The WK?

Q. Well, this price list—could I show this to the witness, your Honor?

(Testimony of Claude Byron McQuiston.)

The Court: Yes.

Mr. Jaureguy: Q. This price list you are referring to, that is the same sheet of paper that you gave him, twenty-three [48] forty-five or twenty-two hundred? Which did you give him, twenty-three forty-five or twenty-two hundred there?

A. No. I quoted this price here, the lowest published price, $2850.

Q. $2880? A. This one here.

Q. Twenty-eight eighty. That is the WK?

A. WK.

Q. And that price list is September 22, 1941?

A. That is right.

Q. The price is subject to change without notice. Would you know whether that was the same price in April, 1943?

A. Well, let me look at your book and see. That is the catalogue number thirty-four thirty-one—thirty-four.

The Court: A little louder, please.

The Witness: I am talking to myself here. That is the catalogue number, dated May 18th, 1942, is the last published price of that particular tractor WK, $2880.

The Court: What was the price of the new rig in April, '43? A. The new rig?

Mr. Jaureguy: The new rig. He means the one of the Diesel engine.

The Court: Full Diesel. A. In '43?

The Court: April, '43. Isn't that when this sale was made? [49]

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Yes. That is right.

Mr. Joy: Would it be out of order, your Honor, if I would say something right now?

The Court: No, I don't think it would. I don't know what you are going to say.

Mr. Joy: I am just trying to help. In '41, October 1st of '41, prices were frozen, so that is the date we are interested in.

The Court: Is that your view, Mr. Jaureguy?

Mr. Jaureguy: To tell you the honest truth, your Honor, when you talk about prices being frozen in 1941 you can go over to the OPA and you will see just stacks, and stacks, and stacks of regulations that have come out since October, 1941, changing these prices and changing the ceiling. So I am not willing to take that statement. I can't deny it but I just am not willing to take it.

Mr. Joy: I think your Honor will take judicial notice prices were frozen in 1942 of foodstuffs, freezing the prices. That is customary in the OPA.

Mr. Jaureguy: I will go along with you on that, yes.

Mr. Joy: This is machinery. That is the only difference. It has to have a freezing point somewhere.

Mr. Jaureguy: The regulation here is not October, 1941. It is later than that. Then there were others, a good many others. [50]

Mr. Joy: This was published in '42, wasn't it?

The Court: When did the full Diesel come out? Three years, he said?

(Testimony of Claude Byron McQuiston.)

A. Approximately three years, as I can recall from memory.

The Court: Well, just trust your memory for this. Well, its price then must have been the same. This price must have been frozen, too.

A. I have the price sheet here dated September, 1941. That was the same then.

The Court: Well, that is all we need. Forty-two hundred? A. Forty-two hundred fifty.

The Court: Now you say the question that has been developed, the issue has been developed, Mr. Joy, whether this full Diesel is the most comparable, or this gas rig is the most comparable.

Mr. Joy: Yes, your Honor. I don't want to interrupt.

Mr. Jaureguy: Now I don't know about the Court. Speaking for myself, I am a little ignorant of tractors and engines. Will you explain the difference?

The Court: I am going to take the view that the full Diesel, having supplanted both of them, is the one they sell now to replace both gas and the first Diesel.

Mr. Jaureguy: Yes.

The Court: I will take the view that the manufacturers said about it was the best idea, and that that is the com- [51] parable type so long as it was in production there in September, '41.

Mr. Jaureguy: Now is there any——

The Court: They brought it out to replace two of them.

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Yes.

Mr. Joy: I don't believe the witness actually said that.

The Court: That is what he says.

Mr. Joy: May I ask one question?

The Court: When your time comes. Let him do it when Mr. Jaureguy finishes.

Mr. Jaureguy: In view of that, I do want to ask this question: The difference, from the standpoint of the tractors——

The Court: You don't need to go into it any further for me now—not on this point, if you want to try it before some other judge somewhere, unless——

Mr. Jaureguy: No. I——

The Court: ——unless Mr. Joy is correct in what I understood he said, that the manufacturer brought out this full Diesel to replace the two other rigs.

Mr. Jaureguy: That is right.

The Court: As his idea of what was best in that field for those two other rigs. That is the nearest comparable type then as the '43, as far as I am concerned.

Mr. Jaureguy: Q. Now you also gave us some figures on, what I will call parts, crankcase guard, radiator guard, and [52] something that was $17, and the 18-inch shoe. Would those prices be the same for the new tractor that has replaced the others?

(Testimony of Claude Byron McQuiston.)

A. They were not scheduled the same, no.

Q. They were not scheduled the same?

A. They are different equipment.

Q. Could you give them to us for the new one?

Mr. Jaureguy: I don't suppose that is material, though, come to think of it. No, it would not be. I will withdraw that question.

Q. The old WKO that didn't have the armor and the bull hook on it when it was sold at that last price, did it?

A. Has the last price been mentioned on the WKO?

Q. No, it has not. Give it to us, will you.

A. $3095.

Q. And that didn't include the bull hook and the armor, did it? A. No.

Mr. Jaureguy: You may take the witness.

Redirect Examination

By Mr. Joy:

Q. On October 1st, 1941, was the WK in production? A. It was still in my price book.

Q. Then you would infer it was in production?

A. It must have been. [53]

Mr. Jaureguy: In 1941?

Mr. Joy: Yes. I am speaking about the freezing date, October, '41. Then the time of the freezing date, October 1, 1941——

The Court: I don't see what the freezing date has to do with determining comparableness.

Mr. Joy: Very well. I will withdraw that.

(Testimony of Claude Byron McQuiston.)

The Court: The sale was made in April, '43, and the question is, what piece of equipment as of that date was the most comparable to the one that has been sold? It is true you go back to the freezing date to find out the price if it was in production at that time, if we find out this one was, but your comparison is made as of the date of the sale that is under investigation is not what the regulation says. The regulation does not relate you back two years, does it—nearly two years?

Mr. Joy: That is a tough question for me to answer. I guess I will have to pass that. Do you know?

The Court: Better get through with this gentlemen. Then we will take the afternoon recess and try to get along a little faster.

Mr. Joy: Q. Was the full Diesel being made, that forty-two hundred fifty job, October 1st, 1941?

The Court: Yes. He had a price list September, 1941.

Mr. Joy: Well then, if they were both being made on [54] that date, which he states is true, the fact——

The Court: How we make the comparison is of '43, when the sale was made.

Mr. Joy: I would think that the—all right.

The Court: This war might last ten years. Ten years from now, when a man is charged with violating a ceiling price, we won't say, "Did you charge more than a comparable article was sold for thirteen years ago," will we?

(Testimony of Claude Byron McQuiston.)

Mr. Joy: If on this date in October, in '41, the prices were frozen at a certain level, and on this date this WK job was the nearest comparable machine, then wouldn't that price be frozen and go on forward for as many years as necessary to cover this particular case?

The Court: Well, I think——

Mr. Joy: I won't argue, your Honor.

The Court: Well, we had just as well. That is what you are here for. Even taking your statement as true in every way—as correct, rather, in every way—the question of comparableness still exists and that would be determined as of the date of the supposed infraction by the defendant. Now in this case it was '43 and in '43, pretty nearly two years preceding, this company had ceased production of the original Diesel and had brought out this new full Diesel, as it was substituted. Now you may have to look back to '41 to find [55] out what the price was because it was frozen at that date. That simply means in '43 the price was the same as it was in '41.

Mr. Joy: I only propose to bring out the comparableness. No one at all is to set the nearest price. If it was set in '41 for this job it must have continued during that time. It lasted up to this minute.

The Court: Nobody said in '41 that a particular unit being made at that time was the one most comparable to a used piece of equipment that was going to be sold two years later.

(Testimony of Claude Byron McQuiston.)

Mr. Joy: At that time we said that the WK was most comparable to a WKO, which had gone out of production. It was not in production in——

The Court: But what in '43 was the most comparable to the WKO?

Mr. Joy: The 1941 freeze price for the WK.

The Court: Why?

Mr. Joy: Because it was so comparable mechanically.

The Court: In '43?

Mr. Joy: We are speaking now of merely abstract prices being set and machines going out of production. My point is that the frozen price was the most nearly comparable in 1941, when the WK was in production.

The Court: Well, I doubt that we compare units. We don't compare them. We compare units; we don't compare prices to [56] find out what piece of machinery was the most comparable as of the date of supposed infraction by the defendant. Now in April, '43, he sold a used piece of equipment. He was privileged to sell that for 55 per cent of the list price of the then most comparable piece of equipment? Isn't that right?

Mr. Joy: Well, I don't exactly subscribe to that. I think the comparison was made——

The Court: You think that he was entitled to charge 55 per cent of what was the most comparable piece of equipment two years previously?

Mr. Joy: Yes, your Honor. That is when the price was set for freezing period.

(Testimony of Claude Byron McQuiston.)

The Court: Do you agree with that?

Mr. Jaureguy: No. I don't know that you will find where either the regulations here—we will have to kind of possibly go back and forth, but I think the language of the regulation is clear. But I think it reads that way: "The highest maximum price to any class of purchasers for the nearest equivalent new machine or part f.o.b. factory, whether established by this Maximum Price Regulation No. 136, as amended, or by any other price schedule or Maximum Price Regulation or order issued by the Office of Price Administration"—it is better to read the whole sentence: "The price for any rebuilt and/or guaranteed machine or part shall not be more than 85 per cent of the highest maximum price paid any class of purchaser for the [57] nearest equivalent new machine." It doesn't say the time; and similar language in the later subparagraph that refers to secondhand machinery.

The Court: Do you want to take part in this, Mr. Wagner?

Mr. Wagner: If I could interpose a question to shorten it, it would seem to me that the matter of the differential as between the oil-burning ignition type of machinery and the full Diesel equipment should be taken into consideration.

The Court: Well, don't bring that in now. That is not shortening it; that is lengthening it. Let's stay with what we have before us. When we compare units in—what is the date that we compare units?

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: I think that the comparability goes to the similarity of the equipment and also price.

The Court: What date do we compare? We have to compare some date.

Mr. Wagner: I think you can take almost any date and ascertain what the differential is as between the oil-burning ignition type and the full Diesel type and arrive at what the comparable price would be for the equipment as sold in this case. As I understand it, cost and selling price in the case of a full Diesel equipment always is at a much higher figure than with the oil-burning ignition price. Am I right or am I not?

The Court: That seems to be another point. That goes to [58] what types are comparable. I am asking what seems to me to be a question that would admit of a simple answer and has to be answered simply. Do we make this comparison as of the date of the alleged offense?

Mr. Wagner: Well, I——

The Court: I am a man up here with a tractor on my hands, a used tractor, and I want to sell it and I don't want to break the law, and I find that I am entitled to sell it at not to exceed 55 per cent of the cost price new at the factory of comparable equipment. Now comparable equipment at that time.

Mr. Wagner: I would think so. Yes, your Honor.

(Testimony of Claude Byron McQuiston.)

The Court: That is all I want to know.

Mr. Wagner: At that particular time.

The Court: That is all I want to know.

Mr. Wagner: However——

The Court: Now that leaves the question open for argument, whether the full Diesel that was brought out was in production, and had been for nearly two years at that time, replacing two former units of cost, and the original Diesel, was comparable equipment?

Mr. Wagner: That is the question.

The Court: Yes. That is still in the case.

Mr. Wagner: That is a point of argument.

The Court: Yes.

Mr. Wagner: But I would appreciate ascertaining what the [59] differential is in order that we do have a factor.

The Court: Now mind you, this company had gone out of production of the gas unit. It had gone out of production of the original Diesel unit as of the time of the sale of this condition. It had only in production at that time a full Diesel unit, a more expensive in every way unit than the two former ones, but that was the only unit new that it had in production at that time. Now that is what the question bears down to. Now does this man get the benefit of that fact, that the only comparable unit being produced new at that time was considerably more expensive than the one that he sold? Mr. Joy, I see, was going back to October, 1941.

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: Well, I would like to—of course, this may be subject to objection but I would like to ask the witness what the comparable full Diesel type of equipment, what its price was as of the same date that this particular equipment was new?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial.

The Court: I don't think they were in production. I don't think their production overlapped.

The Witness: Not when the WKO was in production, no.

Mr. Wagner: Q. During any period was there any period of time wherein an ignition oil-burning piece of equipment was [60] being produced at the same time as was a full Diesel piece of equipment, where the only difference in the two pieces of equipment would be the motor?

A. Not with our firm.

The Court: It is not likely a manufacturer would do that. You know how they are?

Mr. Wagner: Yes.

The Court: They get a new model over here in the automobile business and they just produce that model, and other equipment people are inclined to do the same thing. That is basically to replace the unit.

Mr. Wagner: Q. What date was the change made by the Allis-Chalmers people in the manufacture? When was the change-over made from one type to another?

(Testimony of Claude Byron McQuiston.)

The Court: He brought ou the full Diesel in September, '41. That is the first price he has on it.

A. I haven't got the exact dates or records here with me. It is just according to my memory.

Mr. Wagner: Q. In September of 1941, but you did have——

A. I do have a price list on it here for that year.

Q. For 1941? A. That is right.

Q. And during that year was any production made of the oil-burning things at all?

A. No. [61]

Q. When did that cease? Approximately when did you cease production of the oil-burning type of ignition equipment?

A. I believe it was around '39 or '40 sometime.

Q. Generally speaking I understand, Mr. McQuiston, that there is a difference as far as ceiling price, or cost of production, between the two types of equipment, oil-burning ignition type, on the one hand, and full Diesel type, on the other. There is a difference; is that right?

A. There is in our case.

Q. Generally speaking, can you say how expensive that difference is?

A. I only have the one experience here going into this new full Diesel. About $1200 difference in the price, approximately.

Q. But that was for different periods of time?

A. No. From the time it came out. I think it was around the same price when it came out. You have more tractor.

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: I thing that is all.

(Witness excused.)

The Court: Let's take a recess anyhow for ten minutes, and try to get through this afternoon.

(Short recess.)

Mr. Joy: The plaintiff rests, your Honor.

Mr. Jaureguy: Call Mr. Trullinger. You want to put that [62] in evidence, don't you?

Mr. Joy: Yes. If your Honor please, may I reopen my case long enough to substitute the original bill of sale for the copy which is now in evidence?

Mr. Jaureguy: I think he means he wants to offer this in evidence. He and I have been talking about this procedure and I may have misled him by thinking when I handed something in at pretrial it was in evidence, but I didn't intend that is the rule, and I didn't mean to mislead him.

The Court: It is admitted.

(The bill of sale to L. G. Trullinger, dated April 7th, 1943, was thereupon marked Plaintiff's Exhibit 1.)

PLAINTIFFS' EXHIBIT No. 1

BILL OF SALE

L. G. Trullinger to Earl Gilmore.

Dated....., 19....

Know All Men By These Presents

That I, L. G. Trullinger the party of the first part, for and in consideration of the sum of Ten and

No/100 and other Valuable Consideration Dollars, to me in hand paid by Earl Gilmore the party of the second part, the receipt whereof is hereby acknowledged, do....by these presents, bargain, sell and deliver unto the said party of the second part, his executors, administrators and assigns, all of the following described personal property, to-wit:

One Allis-Chalmers Tractor Serial No. WKO3982 Motor No. 8949. Together with armor—Bull hook and Miscellaneous Parts & Wrenches

To have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever.

And I hereby covenant with the said party of the second part that I am the lawful owner..of said goods and chattels; that they are free from all incumbrances that I have good right to sell the same as aforesaid, and that I will and my executors and administrators shall warrant and defend the title thereto unto the said party of the second part, his executors, administrators and assigns against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, I have set my hand and seal this 7th day of April, 1943.

Executed in the presence of:

.....(Seal)

.....(Seal)

I, L. G. Trullinger being duly sworn, depose and say that....the sole owner..of the property described in the foregoing bill of sale, and that the

same is free and clear of leins and encumbrances of every kind and nature, at the date of execution of said bill of sale, and the same have been paid for in full.

L. G. TRULLINGER

Subscribed and sworn to before me this 7th day of April, 1943.

[Seal] ESTIS L. MORTON
Notary Public for Oregon.
My Commission Expires
Oct. 4, 1943

State of Oregon,
County of Hood River—ss.

Be It Remembered That on this 7th day of April A. D. 1943 before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named.....who is known to me to be the identical individual described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal] ESTIS L. MORTON
Notary Public for Oregon.
My Commission Expires Oct. 4, 1943.

DEFENDANT'S EVIDENCE

L. G. TRULLINGER,

the defendant, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Jaureguy:

Q. Will you give us your name, please.

A. L. G. Trullinger.

Q. And where do you live?

A. The Dalles.

Q. And what is your occupation? [63]

A. I am in the lumber business.

Q. At the Dalles? A. That is right.

Q. And in April, 1943, what was your occupation. A. I was in the lumber business.

Q. And where were you then?

A. I was working at Hood River, and my mill, my sawmill, was in Hood River County. My planing mill was at Moser, in Wasco County.

Q. Do you remember the occasion when you sold a tractor to Mr. Gilmore? A. Yes, sir.

Q. And from whom did you buy that tractor?

A. Oh, I bought it from a farmer by the name of Echelbery, in Eastern Oregon.

Q. Do you know whether he had had it on his farm?

A. Well, it is my understanding he had. He had a farm at that time and he had used it at that, so he told be but I had never seen it there.

(Testimony of L. G. Trullinger.)

Q. And is that the kind of a tractor that could be used on a farm?

A. Oh, yes. It had been used on a farm prior to the time I bought it, or prior to the time I used it on my job. I didn't use it on my job to start in with, but he came up there and he was there with it.

[64]

Q. And what did you use it for?

A. I used it for logging.

Q. And did you do anything by way of altering it or repairing it? A. Oh, yes.

Q. What did you do?

A. Oh, the machine had new pistons, rings and wrist pins. Now that was put in in '42.

Q. Tell us what happened in '42, first. Yes.

A. In '42? Well, we got ready to start the mill again. You see, this was a seasonal operation. When the weather got bad in the hills we were unable to log, being as we were on dirt roads, and then in the spring we went through the machine; we put in new liners, the cylinders, that is piston rings and wrist pins, and line-boarded the machine, overhauled the fuel pump, and it had a Diesel bush, a Diesel pump on it. We put the fuel and the cylinders through in each case, the sums paid and the people, and, oh, there was considerable other work. I have the bills there for the parts, which approximate $500.00, I would say.

Q. Yes. Then after you put those repair parts in, in 1942, how much did you add to the machine?

A. We got four hundred thousand feet of lumber

(Testimony of L. G. Trullinger.)

that season. We were short-handed and we broke down quite a bit in the mill and we got a very late start. I run the planing mill, [65] oh, up until July sometime, and then we didn't go up in the woods until—well, it was that month—until the month of July, and we could only run the mill about half time with a skeleton crew and we logged part of the other time. We probably actually used the tractor that had been pulling steady, I would say, around maybe thirty or thirty-five days in actual use; that is, in steady, actual use of a regular working day.

Q. And did you use it any in 1943?

A. No, we didn't use it any in 1943. We took it out of the woods in October and took it down to the planing mill, where we stored it during the winter, and I was pretty well cut out up there. That is one reason the stuff was scattered. It was hard to get it. That is why we made a poor showing that year, and I didn't use it at all in 1943.

Q. So after you put all of these parts in 1942 you used the tractor to what would be equivalent you think to thirty days?

A. I would say somewhere around that; thirty days; it might have been thirty-five days; it might have been even forty days, but it was very little use.

Q. Now I want to hand you a list of invoices and bills and ask you whether that is a correct list of your bills and invoices that you put in in 1942?

A. That is right.

(Testimony of L. G. Trullinger.)

Mr. Jaureguy: We will offer that list of invoices and [66] bills in evidence, and we have attached to it an adding machine computation and we ask that that go in just for the convenience of Court and counsel.

Mr. Wagner: They are objected to, your Honor, on the grounds that they are incompetent, irrelevant and immaterial, and have no bearing at all upon the issues as to the determination of the price.

The Court: They are admitted, subject to the objection.

Mr. Wagner: Exception.

(The eighteen sheets, consisting of bills and adding machine tape, so offered and received, were marked Defendant's Exhibit 2.)

Mr. Jaureguy: Q. Then in 1943 did you do any more parts in it or on it? A. Yes, we did.

Q. What did you do in 1943?

A. Well, we put on a new set of tracks. The others were still in service but we were afraid of breakdowns, they were getting worn, and we put in—we had the rollers built up on the other side of the cat, and new bearings, and shoe shafting and the frames that held them were all put in new. There was a new—oh, the bottom half of the matter; I don't know whether they call it crankcase or oil pan—no; it was part of the block—it was put in new, and the cat was [67] completely gone through. We went through every bearing in it, and in the transmission and the rear end, and it was around

(Testimony of L. G. Trullinger.)

$500 worth of parts alone put in at that time, and it never turned a wheel.

Q. I hand you here another list of invoices and bills and ask you if they were the parts that went into it in 1943?

A. Two or three of these that were offered for some of the parts that were shipped to us, but they are the parts. Some of these are for machine shop work. They are not all actual parts, but they are rather small items. There is one four and a half, another one a dollar and a half.

Q. What is that? Machine shop work?

A. That is the machine shop work by Howell Brothers at Hood River, and they are the ones that also built up the rollers, took one side of the tractor. Here is one for $28.00. That was for building up rollers that were put back into the machine after they were built up and turned down again. Here is one to build up a machine wheel for four and a half. They were just repairing little parts, those particular ones. I think the rest of them were all new parts. Yes, sir.

Q. Now what about the tracks? Are they in there?

A. The tracks are not in there. I could not find the invoice on those, and I am not just sure what they cost. If I remember right, they came around $250, but probably Mr. McQuiston over there could give us pretty close on that, including [68] freight.

(Testimony of L. G. Trullinger.)

Q. He has given us some figures there, which I think are a little more than yours.

A. Now that tracks is the rails, pins and bushings, and it does not include the house or shoes. They were the old shoes put back on again.

Q. But your recollection is that you paid for the tracks in 1943 about $250?

A. Including freight.

Q. Including freight?

A. Now I might have been off ten or fifteen dollars on that.

Mr. Jaureguy: We will offer this next one he has given, including also an adding machine computation. At the end of the adding machine computation we have added $250 to represent the tracks.

Mr. Wagner: I wish to object to the introduction of these upon the same ground; also wish to move to strike all of the testimony of the witness pertaining to replacement or repairs, and the amounts that the witness has indicated.

The Court: The motion is denied and the exhibit is admitted, subject to the objection.

Mr. Wagner: Exception.

(Thereupon the 27 sheets, consisting of bills and adding machine tape, so offered and received, were marked [69] Defendant's Exhibit 3.)

The Witness: Now that didn't include labor.

Mr. Jaureguy: Just a minute.

Q. Now your testimony there shows that in 1943

(Testimony of L. G. Trullinger.)

for new parts that you installed on the machine of some small items of labor that you recounted there it runs about $500.00, but what about the labor for the other labor for installing parts?

A. Well, there are no bills for that either. The man that did the installation and the work was one of my regular employees.

Q. And what would you say would be that amount? And did you do any of the work yourself? A. Yes, I worked on it myself.

Q. And what would you say would be the reasonable value of the labor that was put in there by your man and yourself to put those parts in?

Mr. Wagner: The same objection.

A. Oh, I would say four or five hundred dollars.

The Court: The same ruling.

Mr. Wagner: We save an exception.

Mr. Jaureguy: Q. I didn't get your answer?

A. I would say four or five hundred dollars.

Q. Since you put those parts in in 1943 did you use the tractor at all? [70]

A. No, I didn't use it at all.

Q. And what did you do with parts that you took out of the tractor?

A. They were sold to Mr. Gilmore when he bought the machine.

Q. Now how did you happen to sell this machine?

A. Well, I bought The Dalles Mill & Lumber Company, which is a much larger operation, and I needed a larger tractor to supply logs for the mill.

(Testimony of L. G. Trullinger.)

Q. Well, I wish you would kind of elaborate on that. By that, do you mean that this tractor is all right for certain types of sizes of logs but not all right for other sizes?

A. Yes. The larger the log the more weight you must have in your tractor to pull it, and the larger the tractor the larger number of logs you can pull with it at one turn, and I jumped from a mill that was cutting around 15,000 a day to one that was cutting around 35,000 a day; that is, that is what we did cut with it, and I had to have more logging equipment and I did buy a larger tractor. I also needed a bulldozer, which is a part of a tractor, and I bought that.

Q. Well then, you had yours up for sale and Mr. Gilmore learned of it, I take it, and came up to see you? A. That is right.

Q. And just tell what happened after you met him with respect to this equipment?

A. Well, he came there with Mrs. Gilmore and his son and I [71] explained to him what we had done to the tractor and he took it, and his son did, and drove it around in the yard, and I—he said he would go back and make arrangements to buy it, and a few days after that he come back and said he would take the tractor, and he loaded it on his logging truck and he went to the—told me to meet him at Hood River at the bank and he wrote out a check for the tractor and we wrote out a bill of sale there at the bank.

(Testimony of L. G. Trullinger.)

Q. What did you tell him with respect to any guarantees with respect to anything in connection with it?

A. Well, I told him that the parts were guaranteed.

Q. Quaranteed by whom?

A. By the factory, and we would stand back of our relationship, but as to satisfactory performance we told him that we would even do that by paying out the full 85 per cent.

Mr. Wagner: I don't understand.

A. He said he would rather have the cat that way, the way it was, and not pay the difference.

Mr. Jaureguy: Q. Well, how did you arrive at this figure of $2800 under the ceiling price?

A. Well, that is, the cat, they told me when I bought it, cost forty-four hundred dollars.

Q. Yes; told you at Hood River, I take it?

A. That is, well, it was over in Eastern Oregon Some place.

Q. Yes. [72]

A. And it wasn't a new cat. It was an as-is cat; and this was a thoroughly rebuilt tractor, and the—the fact is, I asked $3000 for the cat and Mr. Gilmore offered me $3000 for it with a thousand dollars down, but I told him that I didn't care to sell it that way, and I told him I would knock off $200.00, so he could go to his bank and discount the paper, that is the two thousand dollars balance, and I would stand that two hundred dollar loss, and he came back—and when he came back a few

(Testimony of L. G. Trullinger.)

days afterward and told me he had gone to his bank and they had loaned him the money and he didn't have to stand any of the loss, that they had loaned him the full amount.

Q. I see. You sold it to him for the full twenty-eight hundred?

A. For the full twenty-eight hundred dollars.

Q. But you had figured the amount, in figuring out the possible ceiling price you figured the cost new in Eastern Oregon?

A. Well, I didn't figure it as an as-is tractor.

Q. No, no. You are going too fast. First, I want to find out what you started in at, whether it was the same price asked in the East, the Middle East or Middle West, or whether it was the same price in Oregon.

A. Well, we figured the cat at forty-four hundred dollars. That is what the man told me it cost when I bought it.

Q. Yes. That is, you understood that that cat sold in Eastern [73] Oregon for $4400 when it was new? A. Yes.

Q. Then you took the new parts that you put in. You put in $500.00 of parts?

A. Well, it was practically a thousand dollars of new parts in that machine, but some of them had been used a short time but not much over thirty days.

Q. That is, the parts that had been used thirty days were about $550 worth? A. Yes.

(Testimony of L. G. Trullinger.)

Q. And the parts that had not been used at all was about five hundred five worth, and you took that into consideration, and your labor for installing them?

A. Well, that should have been way under ceiling price in actual value of the machinery.

Q. I know, but what I am asking you is this: Are those the things you took into consideration in determining whether you were way under the ceiling price? A. That is right.

Q. Yes. That is what I am trying to get at. Now this bill of sale that—you have seen this bill of sale in evidence, and that is your signature on it?

A. That is right.

Q. That says, "One Allis-Chalmers Tractor", and it gives the serial number, and it says, "Together with armor, bull hook [74] and miscellaneous parts and wrenches." I want you to tell us about the armor, the bull hook, and the miscellaneous parts and wrenches.

A. Well, the armor I had made by Howell Brothers in Hood River, and then there was a bumper on it; that was a piece of railroad iron; and the bull hook is a hook that fastens—that goes into the drawbar of the machine where they hook the cables; that is, the choker lines.

Q. Are those part of the tractor when it is all new? A. No, no. They are accessories.

Q. All right. Then tell us about the miscellaneous parts and wrenches.

(Testimony of L. G. Trullinger.)

A. Oh, there was a big grease gun. I think they cost around thirty-five dollars, that they use for greasing the tractor rollers. Then there was a smaller grease gun that is used on Alemite fittings. And the wrenches, I don't recall what they were. They were wrenches that they used on the machine, or a part of it. I don't imagine they amounted to a great deal. I think they come with the machine.

Q. Well, what about any other parts for the machine?

A. Well, there were these tracks which were worn. We didn't want to use them but, nevertheless, they——

Q. You mean the tracks on the machine or that were not on?

A. The tracks that were off the machine.

Q. They had been on? [75]

A. They had been on. We had just taken them off.

Q. Yes.

A. Then there were the idlers. There was this crank, this part of the motor block that was together. There was the old one. It is there. All of these things are there yet at Moser. He didn't take them; they are there. They are his.

Q. That is, you sold them to him? A. Yes.

Q. And all of those things were included in the $2800 price?

A. That is right; and he understood it that way, too.

(Testimony of L. G. Trullinger.)

Q. Yes. That is, you discussed it with him?

A. Yes, we did.

Mr. Jaureguy: You may take the witness.

Cross Examination

By Mr. Wagner:

Q. Mr. Trullinger, at the time of this sale did you understand that in order to command an 85 per cent price that there had to be and attendant with the sale a bond and guarantee of satisfactory operation for a period of not less than sixty days?

A. Oh, I didn't know about, you know, how many these regulations are. I have a pile of them that thick.

Q. You knew there was a guarantee there, though?

A. Well, I have heard that. I didn't know it but I have heard [76] it.

Q. And you knew that at the time you made the sale? A. Yes, I had heard it.

Q. Did you at the time of making your sale refuse to give that kind of a guarantee?

A. No. I said that I would for 85 per cent of the forty-four hundred.

Q. For 85 per cent of $4400? A. Yes.

Q. You would give such a guarantee?

A. Yes.

Q. But in this case you didn't give any guarantee?

A. That is right. I didn't get that price.

Q. Didn't give any bond and guarantee at all?

A. Which?

(Testimony of L. G. Trullinger.)

Q. You gave no bond and guarantee at all?

Mr. Jaureguy: Well, he has testified to what guarantee he gave. If you want to call that one or not it is a conclusion. I think it is better for him to ask the witness what he said; then it is a regulation matter whether there was a bond and guarantee or not. I think it is obvious that he gave one but it wasn't at the time.

Mr. Wagner: To begin with, we say——

Mr. Jaureguy: I know, but what I am objecting to is his question. [77]

Mr. Wagner: O. K. I will withdraw the question.

Q. What did you say in connection with a guarantee?

A. Well, the parts are guaranteed by the manufacturers and if there was anything that was defective on those, that we would see that they made good on them.

Q. O. K. What else did you say, if anything?

A. Oh, if there was anything particularly wrong with our relationship let us know and we would make it right. But we——

Q. Did you give him any other writing in addition to the bill of sale? A. No.

Q. That is the only writing that there is in the case?

A. Well, I told him if the thing was put together properly, we had worked on it and the man that had worked on it was a competent man, and

(Testimony of L. G. Trullinger.)

they were Allis-Chalmers parts, and the Howell Brothers were capable men to do the work that was done.

Q. How did you arrive at the figure of $3,000 that you thought to be the ceiling price on this?

A. Well, that was just——

Q. What items did you take into consideration?

The Court: Well, it is not an as-is machine. The machine was a rebuilt machine.

Mr. Wagner: Q. Well, tell me when you arrived at the three thousand dollars. I understood your testimony you gave a discount of $200. [78]

A. That is right.

Q. From the $3,000. A. That is right.

Q. But you arrived at the $3,000 by some process of figuring up ceiling prices; is that right?

A. Well, oh, just about the way tractors were selling for, and the condition of this machine, why, it was just a price that we put on it.

Q. You ascertained—you testified that you ascertained the price new?

A. We figured that a lot less than a regular ceiling price.

Q. What ceiling price did you figure?

A. Well, the machine cost delivered forty-four hundred dollars.

Q. Yes; and you took 55 per cent of that; is that right? A. No.

Q. Or did you take 85 per cent?

A. 85 per cent of $4,400 ran it——

Q. You took 85 per cent?

(Testimony of L. G. Trullinger.)

A. ——way up over $3,000, and I knew that was a lot more than the machine was worth.

Q. You took 85 per cent of the forty-four hundred?

Mr. Jaureguy: He said he didn't.

A. No. I didn't take 85 per cent.

Mr. Wagner: Q. I mean the first step.

A. If we had 85 per cent of $4,400, it was a lot more than $3,000.

Q. Did you figure that way? A. No.

Q. Did you consider that price 85 per cent?

A. I talked about 85 per cent.

Q. You talked about it? A. Yes.

Q. Did you take 55 per cent of $4,400?

A. No.

Q. You didn't do that, either?

A. Because we didn't figure it an as-is machine, and that wouldn't apply to a particular machine like this.

Q. Did you know that the block in the machine was cracked when you delivered it to Mr. Gilmore?

A. No; and I don't know it now, either; and, as a matter of fact, I know the block wasn't cracked when I delivered it to him, because I had operated the machine and we had verified it and it was not cracked.

Q. You testified as to the armor you put on after you had it? A. Well, I had it put on.

Q. Well, you had the machine? A. Yes.

Q. How about the bumper? Was it already on there?

(Testimony of L. G. Trullinger.)

A. Well, we had one on the machine that we broke off, but that was one my man put on. [80]

Q. This was a replacement?

A. Yes. We didn't put it on. It come on it.

Q. How about the bull hook?

A. We had that made in Hood River.

Q. You had that made additional?

A. Yes.

Q. After you got it? A. No.

Q. You didn't put it on? A. No.

Q. How about the grease gun? Did that come with the machine?

A. That came with the machine.

Q. Both of them?

A. No. One of them I bought.

Mr. Wagner: I think that is all.

Mr. Jaureguy: That will be all. Thank you.

(Witness excused.)

Mr. Jaureguy: Defendant rests.

REBUTTAL

EARL GILMORE

was thereupon recalled as a witness in rebuttal in behalf of the plaintiff and, having been previously sworn, further testified as follows: [81]

Direct Examination

By Mr. Wagner:

Q. Did you hear Mr. Trullinger testify that at

(Testimony of Earl Gilmore.)

the time of this sale or delivery of this tractor to you that he told you that all the parts were guaranteed by the factory?

A. I did not hear that.

Q. Did he indicate to you that under any circumstances he would give you a price guaranty?

A. No, sir.

Q. For performance of the machine?

A. He did not under any circumstances, no.

Q. What did he say, Mr. Gilmore?

A. He said that the price wasn't right to guarantee it; that there wasn't enough money to guarantee it, and that, therefore, he wouldn't; and at the time I bought the cat we tried it out. It run on three legs and three cylinders.

Mr. Jauregui: That is not responsive.

Mr. Wagner: Q. Did you discuss ceiling prices at the time you took delivery?

A. Yes. I asked him if he was within the price list, and he said he was.

Q. Did you discuss Office of Price Administration ceiling prices? A. No, I didn't.

Q. You didn't. Did Mr. Trullinger quote a figure of $3,000 [82] to you?

A. Yes, he did. He quoted the figures in this way, and then finally I kept thinking that was too high and he said, "Well, being as the condition that it doesn't run just exactly right, why, I will knock off two hundred dollars if you will pay me cash." And I said, "Well, I will let you know by tomorrow sometime"—that would be the sixth of

(Testimony of Earl Gilmore.)

April, it was—"whether I will take it or not," which I called him up finally. Me and the boy decided that it was O.K., we would go back and take it.

Q. You paid cash then? A. I did.

Q. And got it for $2,800?

A. And I didn't borrow the money, either, as Trullinger said.

Mr. Wagner: I think that is all.

Cross Examination

By Mr. Jaureguy:

Q. That is, as I understand it, he said that this price of $2,800 wasn't enough to justify him in giving you a full guarantee?

A. That is right. That is what he said.

Q. If you wanted a full guarantee it would have to be more? A. Yes, that is right.

Q. Yes. And then he told you, I take it, that that machine had a lot of new parts in it? I think you have already [83] testified to that.

A. It possibly had some new parts. I don't say all of them could have been; lots of them; because there are not too many parts in a cat.

Q. That is, they were not all new?

A. No, they were not all new.

Q. Some of them had been put in the year before? A. Possibly.

Q. And he told you that he believed that it was well within the ceiling? A. Price.

Q. In doing so he discussed the new parts that had been put in?

(Testimony of Earl Gilmore.)

A. Well, no, he didn't discuss all of the new parts. He had built up some of the rollers, the track rail, which was very poorly built up. They were not ever turned down; they were built up—never returned down on the lathes in any way.

Q. You didn't think so, eh? A. Huh?

Q. I say, you didn't think they were?

A. I knew they weren't.

Q. You noticed that before you took it?

A. I did.

Q. Yes.

A. Although they were new rails. [84]

Q. New track?

A. They were new rails, yes.

Mr. Jaureguy: Yes. That is all.

(Witness excused.)

Mr. Wagner: That is our case, your Honor.

The Court: Argue.

Mr. Joy: If the Court please, the defendant has admitted that he did not guarantee this tractor as in accordance with the Regulation, M.P.R. 136, and did not give an invoice, which is also required by the regulation, and for the plaintiff's part of the case Mr. Gilmore has testified to the condition of the tractor, which was unsatisfactory from the start and ended up in the condition where he had to quit that particular job and sell the tractor. And as to the ceiling price of the machine as it was sold at $2,800 it is the plaintiff's position that you should take the nearest comparable tractor and

that that should be the WK model, which was in production in 1941 and sold at that time at $2,800 —$2,880—and it is our position that that was the frozen ceiling price as of October 1st, 1941, and that that ceiling price holds. The main reason for that is that it certainly is not a very nearly comparable tractor, when you bring into the picture a Diesel at a much higher price and a different motor, quite different—entirely different, really, because this tractor that he [85] bought was not a Diesel motor. The tractor that Mr. Gilmore bought was not a Diesel motor.

The Court: Well, you have to separate the questions. I hope it does not but the war may last ten years, as I said a while ago, and the first question you have to figure is whether or not ten years from now if the war is still continuing and if a man sells a piece of equipment it is compared to the comparable price in 1941. If in 1951, should the war unfortunately be continued, and the OPA forced to be continued, to work indefinitely and the OPA definitely in 1951, then will we go back ten years and find some comparable piece of equipment to compare it with what was sold in 1941?

Mr. Joy: Well, if anything, it certainly would not be more, your Honor. It would be less, due to the depression. But it could not exceed that ceiling price. Under the OPA regulations, your Honor, it can always be sold less than the ceiling, but in no event over. It is our position that this machine —I refer to the WK model—the ceiling price of $2,880 is the nearest comparable machine and should

be used in the manner in which the regulation prescribes as the nearest comparable machine, and to be used as a guide in the pricing of this machine and not more than that—in any event not more than that. The defendant did not guarantee this machine, as I have said, and did not comply with M.P.R., Maximum Price Regulation 136, and the sale of this tractor exceeded the [86] ceiling as outlined in our complaint, and the Office of Price Administration claims that we are entitled to treble damages for the overcharge.

I don't think of anything else.

Mr. Jaureguy: Is that your argument?

Mr. Joy: Yes.

Mr. Jaureguy: Of all three of you? I am very sorry that they didn't argue at length, your Honor, because, as I said in my opening statement, there are other problems here that are involved and I really would have liked to have their views on it. They have stated that the M.P.R. 136 applies but they haven't pointed out to your Honor exactly why it applies, nor the particular provisions of it that they claim were violated in this particular case.

I have also said to your Honor, and we have argued here purely that this is a case where the person who purchased it was an ultimate user or consumer and he did not purchase it for use or consumption in the course of trade or business; and I have told your Honor there were decisions both ways on that point. I want to argue all of these points. I don't think I would be doing my duty to my client if I just took the arguments they have

given us and answered them, without going into those other points, so I have just got to start fresh on these and I will do that, and I hope that I am not too tiresome when I do it. [87]

Now I think we have two of the regulations, and I would like to get the one that is in evidence, then we can each have one. There are three points in these regulations that I wish to discuss, but I wish to discuss one of them first, then go on to the argument from the rest as to the meaning of the law, and then go back to the regulation, and that is one of the points that they have discussed. I wish to address myself to that, and that says, "The price"—and I am reading now in this exhibit that has been introduced, which contains Regulation 136, and I am reading Section 1390.11, subdivision (c) of that M.P.R. 136:

"The price for any other secondhand machine or part shall not be more than 55 per cent of the highest maximum price to any class of purchasers for the nearest equivalent new machine or part f.o.b. factory, whether established by this Maximum Price Regulation No. 136, or something else."

Now I take it that the burden is on them to prove that the price here was in excess of the maximum price that is set by this regulation and in order to show that it is above that they must show what the price new——

The Court: I wonder if that gentleman wants to get away. I wonder if any of these people want to get away. Sometimes witnesses don't understand when they can go.

Mr. Jaureguy: Yes. You understood you didn't have to stay unless you wanted to. [88]

Mr. McQuiston: Oh.

Mr. Jaureguy: And at the time this sale was made I am not going into an argument unless your Honor cares to have me, as to whether a gasoline engine tractor is the nearest equivalent to a Diesel engine, because I think your Honor has already stated, which I think is certainly sound, that the one that they were then in April, 1943, selling as the nearest equivalent is the one which is the nearest equivalent. I think that is very clear. The f.o.b. factory price on that was $4,250, without any additions. Then there were several additions here we have been talking about, and in this case there were no parts which were put into this machine which were not secondhand parts. Whatever you want to say, as to whether this was an as-is agreement, or partly guaranteed and partly as is, there were no parts——

The Court: Where is that portion found?

Mr. Jaureguy: As is, I think—well, I got it from Mr. Joy and I think he got it from the Act. No, it is not in the Act. The Act——

Mr. Joy: It is in the Act.

Mr. Jaureguy: (e); yes.

The Court: Well, it will turn up.

Mr. Joy: It is used in connection with as is with reference to dismantling.

Mr. Jaureguy: That has to do with dismantling. I was [89] using it I guess, not in connection with the Act but I would say as distinguished from either

a new one or a guaranteed one; that is, this was a machine in which he had put in new parts and the new parts had never been used. The parts themselves cost him $500, and the labor to put them in was worth, according to the testimony, another $500, and he sold this machine, with the new parts in it, together with the old parts that had been taken out for replacement, and together with the wrenches, bull hook, and the guard, and these other things which there has been some testimony about, one of these items I think there is no testimony whatever—and they were all sold—where the nearest equipment, without these extra parts, was $4,250, and the whole thing was sold for twenty-eight hundred, which would be 55 per cent of $5,100; so we say that even though this regulation applies, to which I am going to refer later on, he was as he himself explained it well within the ceiling. I am going to come back later to this regulation to raise the question whether this regulation applies to this sale at all then in circumstances——

The Court: Well, it wasn't even 55 per cent of $4,250?

Mr. Jaureguy: That is right. It wasn't even 55 per cent of $4,250. It was, however, well within 55 per cent of that, plus the materials that went in, which were new materials and those that had been used thirty days, and the labor to install them; it was well within that. I haven't figured out here [90] what 55 per cent of $4,250 is.

The Court: $2,337.

Mr. Jaureguy: Yes.

The Court: $462.

Mr. Jaureguy: Yes. And then there were new parts that were testified to, that they admit. As I understand it, they admit there were additional parts, the bull hook, and he armor, and two or three things of that kind.

Now I want to discuss these other questions before I come back to this regulation, and that is whether the Administrator of the Office of Price Administration has an action at all, because I think I can say that most of the Courts that have passed on it, either by way of decision or dictum, have said that in a case of this kind the Administrator does not have the action. I mean, didn't have it prior to the amendment with which we are now concerned, because I think everybody agrees that that amendment is not applicable here. The Act was amended last summer and one amendment was made retroactive and one was not made retroactive. The amendment that was made retroactive was the amendment which gives, your Honor, the discretion to enter judgment in any amount not greater than three times, instead of not giving your Honor that discretion.

"If any person"—and this is what the statute says—"If any person selling a commodity violates a regula- [91] tion or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action."

And then it says, "In any case where the purchaser cannot bring an action the Administrator may bring it, and if the purchaser bought for some use or consumption other than in the course of trade or business the purchaser may bring the action."

As I say, I am sorry they haven't argued that point, but I just feel that I have got to, because it seems to me it is in point here. And I may say the Courts have several times remarked upon the ambiguity of what that means. Some have said if that meant to include a type of case such as this they could not have said trade or business; they should have said trade, business, occupation or profession, which is a very common expression when you wish to cover anything that is used for a person in his livelihood, trade, business, occupation or profession. But they didn't do that. They said, "Who did it for use or consumption other than in the course of trade or business." It is our contention here that that expression, that a person purchases for use or consumption other than in the course of trade or business, means that a person who buys it for use or consumption other than for purposes of resale Trade and business are both expres- [92] sions that are very often used in the business of buying and selling. In fact, the original meaning of trade—it has taken on lately other incidental meanings, but the original meaning of trade was barter back and forth, and trade in business is an expression which is very often used to mean the price of buying or selling, and when you get down

to the reason for the rule, or the reason for the distinction, it is this: That when a man bought something, as some of these authorities point out, when a man buys something for resale there are one or two situations that may exist, and very often both. Usually he is particeps criminis with the seller. They are both in the position where they are engaged in that kind of business and, therefore, they normally expect them to know the regulations. And so most of the time where a retailer pays a wholesaler more than the price ceiling he does it knowingly and voluntarily, and, therefore, we should not give him the right. And the other reason for the rule is that many of the price ceilings that a retailer sells are based on the prices he pays, and that a retailer buying under those circumstances would very often, if not always, pass on the price ceiling to his consumers; and so he should not be permitted to get for his own use treble damages from the man that sold it to him. But when you come to the ultimate consumer, whether it is a farmer buying a tractor to use on his farm, or somebody else using something for his business, a [93] lawyer buying a desk for his office, if you want to go that far, or a man buying, as one of these cases points out a man buying a tractor for the purpose of beautifying an estate for himself, or whether he uses it in livelihood or not, there is no reason one person, the person who buys for his own use and without the intervention of making any profit out of it, why he should have the right and the other man not have it. So this type of situation has been

before the Courts I think six or seven times. One of the earliest cases, which I think went too far, is strongly in my favor, but I don't urge it upon your Honor as being a sound case because I just don't agree with the reasoning of it, as has been pointed out by other Courts. But, nevertheless, I want to call your Honor's attention to it, because it is referred to in later cases, in which the later cases follow the exact line of reasoning I have tried to outline to your Honor, and that is it is only the man who buys for wholesale who is not permitted to bring the action for treble damages, and the man who buys for his own use and is the ultimate consumer and should be permitted to, whether he is going to use it in some occupation or whether he is going to use it as an ultimate consumer and not in any occupation.

In this case it was an action against some retailers who had bought—no, I beg your Honor's pardon. This was an action against those who had sold the retailers. In other [94] words, the purchase was for the purpose of resale. No; I am wrong on this now. I am sorry. I thought I had that in mind. No, I don't think they were retailers. I think they were those who got it for their own use. No; I think I will go back to my original.

The Court: It can't be a very good headnote.

Mr. Jaureguy: No, the headnotes are not. I am not even sure that it points out what it was for. Anyway, I want to read what the Office of Price Administration in arguing this case to the Court claimed this case was.

The Court: What Judge wrote that opinion?

Mr. Jaureguy: This was Judge Hall, in Los Angeles.

The Court: Yes. That is on appeal.

Mr. Jaureguy: I learned in reading the cases to your Honor that this case was on appeal, so I got service. I wired down two or three days ago to the Clerk and the Clerk wired back that it had not yet been decided. The opinions I get are anywhere from three to six weeks late, and I was afraid I would come in here and they would spring an opinion on me, and I didn't like to take that chance. Anyway, this is what the attorneys for the OPA were contending:

"It is the contention of the attorneys for the Administrator that a person who buys a commodity at retail may bring an action for treble damages, but that the retailer, who has had to overpay his wholesaler or producer, cannot [95] bring such an action, and that such right belongs exclusively to the Administrator"—just exactly what I am contending here. "The result of this contention is to say that a person paying 10 cents extra for a small sack of sugar at retail can bring as much of it, $50.00," and so on, but the retailer, who has bought for a thousand dollars, cannot sue for three times. That is what I am contending, too.

"This is so, say the attorneys for the Administrator, because the retailer's purchase of the sugar is 'in the course of trade or business,' and that the retailer's sale to the consumer is 'other than in the course of trade or business.' "

That is just exactly the contention I am making here, is the contention that the attorneys for the OPA were making to the Court in this case.

Then they go on and point out why the retailer should not be permitted to bring an action. "Such construction and its results are unjust in those permitting a squeeze to be made upon a wholesaler so as to put him out of business or induce him to break the law," and so on.

"The literal meaning of the language under discussion produces a result which is likewise unjust. The Act says an individual can sue if he buys something 'other than in the course of trade or business.'" Well, I disagree with the Court. The Act does not say that. The Act says, not if he buys within the course of trade or business; it [96] says if he buys for use or consumption other than in the course of trade or business. "As just indicated, when a person buys something at retail the sale is made 'in the course of trade or business,' just as much as when a retailer buys from his wholesaler, so, if an individual," and so on.

And the Court finally concludes as follows: "My view of the correct situation of law as I announced from the bench: The right to sue for treble damages against anyone regularly engaged in business who has overcharged, either as a producer, wholesaler or retailer, is exclusively the right of the individual or concern having to pay the overcharge, and the Administrator has no right to sue in such instance, but is limited in his right to bring actions for treble damages to suits against blackmail oper-

ators and bootleggers and others not regularly engaged in business."

Now I have called your Honor's attention to that case, not because I want your Honor to follow it, because, as I say, it has been criticized by later cases, but for two purposes: First, to call your attention to the fact that the attorneys for the OPA in this case were making exactly the argument I am making here; that is, that the line of demarcation is whether or not the person who purchased it was for the purpose of acquiring it or for the purpose of his own examination; and the second reason is [97] so when you examine some of these authorities that criticized it we may know just what they are talking about and know that all authorities that criticize it are not hard fashioned here but some of them are just exactly in accordance with our contentions. And the first one is another California case, Bowles v. Chew, 53 Fed. Supp. 787. This was a case where the sale was made to retailers and the action was brought, as the title gives, by the Administrator of the Office of Price Administration, and the Court refused to follow the reasoning in the Glick Brothers case.

The Court: What Judge?

Mr. Jaureguy: This is 53 Fed. Supp. 787.

The Court: What Judge?

Mr. Jaureguy: Oh, what Judge? This was Judge Goodman. But here again, while the Court held that the Office of Price Administration was the proper one to sue, the line of reasoning is exactly similar, as I am giving now, and that is that

the OPA had the right to sue in this case because the purchaser was a retailer and the Court first points out what was held in the Glick Brothers case and then says:

"In my opinion, Section 205(e)," which is the section that is involved that I read a few moments ago, "of the Act does not reasonably admit of any such construction. What Congress said, what it meant, and the rationale thereof, are the pertinent considerations in constructing the Act. [98]

"Congress said: 'the person who buys such commodity for use or consumption, other than in the course of trade or business may bring an action * * *'. Thus is described the person who may sue. If the buyer of merchandise is not in the above described category, then 'the Administrator may bring such an action on behalf of the United States.' Thus is described the circumstance whereby the Administrator is empowered to sue. The Senate Report on the Act," giving a citation to it, "indiactes the foregoing to be the precise meaning intended by Congress."

I may say that I finally found the Senate Reports in this city and they copied the parts that are applicable here and I won't read it, except to tell your Honor I don't think it has much to do with this particular question, and I have it here if anyone wants to see it.

"It is not subject to dispute that a 'person who buys for use or consumption,' means, in the ordinary sense, the consumer, i.e. the general public buying over the counter, for its own use. In

order that there might be no doubt that Congress intended this description to be in the ordinary sense, it added the excluding clause: 'other than in the course of trade or business.' Thus," and here is the conclusion the Court draws from that, "the tradesmen, i.e., merchants engaged in business, buying and selling between themselves, were not given the right to sue." [99]

Then the Court goes on to say: "It is clear to me that what Congress said and meant is that members of the general public who buy commodities, to use or consume themselves, may sue for treble damages, but that tradesmen, who deal and buy and sell between themselves in the course of business, may not sue one another."

Then they give—I will read it: "The rationale backgrounding this enforcement program is quite obvious. The consumer (member of the general using and consuming public) cannot in his daily life keep abreast of the ceiling prices of the countless articles on the market which he needs."

A good illustration, Mr. Gilmore told us he didn't keep track of this.

"He can easily be advantaged, since a small overcharge cannot readily be detected.

"To implement the battle against inflation, the right to sue for damages was considered by Congress as an effective deterrent to price ceiling violations. The buying public is enlisted in the anti-inflation fight. It is made worth its while to act as an active agent to enforce the law." Then they refer to that same Senate Report. "On the other

hand, Congress clearly indicated that merchants and dealers, trading with one another, presumably for profit, should not engage in inter-commercial litigation to enforce the Act or prevent violations. Hence the right to sue for such viola- [100] tions was reserved to the Administrator, inasmuch as he has licensing authority under the Act, and may, by virtue of the record-keeping requirement readily assemble the data for enforcement."

And then they go on further and criticize the Glick Brothers case.

So in that case, while holding is not either for or against either side to this case, because the sale was a retailer's, the entire reasoning of the Court is that the expression, "for use or consumption in the course of trade or business" means for persons buying for the purpose of putting it back on the market and selling it, and anybody else is not for use or consumption in the course of trade or business.

Then we have one or two other cases here. Here is another case, which is in a sense very similar to the one I just read, from the Federal District Court for the Western District of Kentucky, and this likewise was a case of an action brought where the sale had been made to a retailer, Bowles v. the Joseph Denunzio Fruit Company, 55 Fed. Supp. 9; and they have other questions of searches and seizures here, and finally get down to this particular question, and here the case began, the sale being made to a retailer. They held that the Ad-

ministrator had the right to sue, but it was for the same line: [101]

"Defendant's motion to dismiss the complaint is based upon the contention that any cause of action under the Emergency Price Control Act of 1942 runs in favor of the purchaser rather than in favor of the Price Administrator. Here reliance is again placed upon the decision in Brown v. Glick Bros. Lumber Co., supra, in which case the District Court sustained a motion to dismiss based upon similar grounds. The right of action being enforced herein is conferred by Section 205(e) of the Emergency Price Control Act of 1942, Section 925(e), Title 50, Appendix, U.S.C.A. It places the right of action in the person who buys the commodity 'for use or consumption other than in the course of trade or business,' and then provides that if the buyer is not entitled to bring the action 'the Administrator may bring such action under this subsection on behalf of the United States.' The provision is in no way ambiguous and needs no judicial construction to ascertain its meaning. Where a retailer sells to a purchaser for use or consumption the purchaser can sue for the damages authorized by the Act; but where a wholesaler sells to a retailer who buys for resale in the course of trade or business and not for use or consumption, such retailer has no authority to institute the suit, but the right of action in such cases is vested in the Administrator." And then they go on again to criticize Mr. Glick, of Glick Bros.,

but their line of reason is again the same line of reasoning I am urging upon [102] your Honor.

Then I have two or three cases on which I don't have the reports here, but one of them is the New York Supplement. I can get this over in the Library and bring them here. It is Lightbody v. Russell, first in the Supreme Court of New York, 45 N. Y. Supp. (2d) 515, and then it went to the Appellate Division of the Supreme Court in 47 N.Y. Supp. (2d) 711, and in that case as you can see from the title it wasn't the Administrator that was suing but the parties were suing, to begin with, in a partnership, and it so happened the article they bought was a tractor and they brought the action and merely alleged in that action that they were the ultimate consumers. No; they alleged they bought it for their own use; and the question is whether or not that was sufficient—whether they didn't have to further say that they bought it for use, not in the course of trade or business; and the Court held that they had stated a proper cause of action because when they said they bought it for their own use that negatived the idea that they bought it for resale, and since, as the Court held the expression for use or consumption other than in the course of trade or business, means for use or consumption other than for purposes of resale, the Court held with the purchasers then who had bought the tractor, and the Court had to construe the complaint most strongly against them. [103]

I don't mean to say everything I am saying is in the opinion. I am just telling you how it had to be rationalized. The Court had to hold then a person who buys a tractor for his own use, where it is in connection with some occupation of some kind, has the right to sue as long as he negatives the thought he didn't buy it for resale. Then that case was appealed to the Appellate Division of the Supreme Court and the Appellate Division affirmed the lower court. There was a dissenting opinion in that case of Lightbody v. Russell. On appeal it is in 47 N. Y. Supp. (2d) 711. In the lower court, 45 N.Y. Supp. (2d) on page 15.

I have tried to make as exhaustive a study of this as possible. I may say that my friends here I think have two cases in their favor. One is a Federal Supplement case, Bowles v. Rock, and another one is—I think there might be a New York Supplement case in their favor, and I think there is an unreported decision in their favor, but I have two unreported cases I have run down through C.C.H. cases, and I want to call those to your Honor's attention. I think sometimes unreported cases are better than those reported, because when they are unreported the Judge sometimes elaborates a little more. At least that is what I have found in these cases.

Brown v. Malloy, the District Court of the Eastern District of Pennsylvania, Federal Court, and the only way I [104] can tell anybody who is interested how to find that case, it is in C.C.H., paragraph 51331. This was a case involving tractors.

A farmer had an auction sale and the purchasers were also farmer, and they bought two tractors and a hay baler, and the question was whether or not the Administratior had the cause of action. Concededly the farmers bought this for use on their farm, and if using for logging is for use in the course of trade or business, then using on a farm is, too. In fact, one of their cases is for use on a farm. And the Court, in referring to this portion in the course of trade or business, said: "We take these phrases to mean that a private buyer who purchases for his own use or consumption is given the right to recover compensation for the unlawful advantage taken of him by the seller in exceeding the ceiling price. But a dealer or other persons in the trade or business who purchases needs no such protection.

"There would seem to be no logical reasons for restricting the privilege to only those persons who buy articles for uses not in any way connected with their trade or business. Such interpretation would mean that a purchaser of a tractor for use on his farm would not be entitled to the redress provided, but a purchaser who buys the same kind of appliance for use in cultivation of his private estate, not maintained as a business, would have the right to recover treble the overcharge. This interpretation is strained and [105] illogical and we would not be disposed to adopt it"; and so they dismiss the action that was brought by the Office of Price Administration.

Then there is another unreported decision, too,

which I think is a very good decision, and that is Bowles v. Googins. This is in the District of Utah; it looks here like the Third District to me; C.C.H., Paragraph 51176. There were two purchases here, both of pipe. A farmer bought some pipe to use for irrigating purposes on his farm and the livestock company likewise bought some pipe for water in order to feed their stock with, and the Court held in both cases—of course, this was just one action for two sales by Googins. The Court held the Administration didn't have the cause of action; the form of action was in the farmer and the livestock company; and the Court makes one observation which I haven't seen in any other case, and I think it is very pertinent; and that is, the Act does not say he buys for use in trade or business, which seems to me would have been the logical thing to say. I would have said, if Congress was intending to provide that nobody who uses it for profit in industry or occupation, or farming, or anything, would have said, as I said before, in the course of business, trade, occupation or profession. But this Court points out here it does not say for use in trade or business, but it says who buys for use or consumption other than in the course of trade or [106] business, and the Court here points out that that distinction there —that there should be a distinction, and then gives this illustration: A farmer who buys himself a pair of overshoes and he wears them to irrigate his crops—gives that illustration. Is there any conceivable reason why the OPA should have the

cause of action for the overcharge, which goes on to point out if he buys a pair of overshoes and uses them for any other purpose, walking back and forth to church or going out hunting, he has a cause of action, but if he uses the same overshoes for the purpose of going out when he irrigates his crops then he doesn't have a cause of action, according to the Administrator's contentions, but the Administrator has it.

I may say in this case, Bowles v. Googins, the Court didn't follow the line of reason that I am urging, and didn't follow the Glick case, didn't follow the Chew case, but had a new independent one, and that is it said that a person who is in some occupation or trade where he makes money, industry, and he buys something that is just bought occasionally, your Honor, he has the cause of action and not the Adminstrator; but if he is in some industry that day after day buys something, even though it is not for resale, the Administrator has it. Personally I don't get that distinction, but he says in the course of trade or business means something about repeatedly, time and [107] time again; and of course a tractor, whether bought by a farmer or logger, is something just bought occasionally. He goes on to give an allustration —a purchaser of large quantities of goods for use in industry, then the Administrator would have the cause of action.

Then there is a third unreported case I would like to call your Honor's attention to, and that is Bowles v. Seminole Rock & Sand Company, and that was by the District Court for the Southern

District of Florida, and you get that in C.C.H., Paragraph 51122, and I am sorry that this opinion here does not tell what it was used for but it is very clear from the opinion what it is. This is an action by the Office of Price Administration and they dismissed on the ground that the Office of Price Administration didn't have the right.

"We will first take up the second count, considering the two counts in inverse order. The Court is of the opinion that no cause of action has accrued to the Administrator for this excessive charge, assuming that it was excessive. As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages. It make no difference whether that ultimate consumer is a housewife purchasing a can of soup or the railroad purchasing a $100,000 Diesel engine. The object was two-fold. First, if the merchant or middleman in purchasing from a [108] jobber or manufacturer was particeps criminis to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore it would have been iniquitous to give him the right to recover three-fold damages when he was as deep in the mud as the manufacturer in the mire; but the ultimate consumer had no place to pass it on and no temptation to pass it on, and therefore the ultimate consumer is who they mean 'in the course of trade' " —the language is a little bit mixed here to me, of course, the way it is in my copy, I am not sure. "They could have used more understandable

language but I construe it to mean 'ultimate consumer.' In addition to that," then they go on to talk about the other.

So we have three Federal unreported cases and one Federal reported case, and one New York case of the Appellate Division of the Supreme Court of New York, expressly holding that in a case of this kind the Administrator does not have a cause of action, either in four of these cases, dismissing it when it is brought by the Administrator, and in the fifth holding that when the individual does bring it he is entitled to pursue it in the face of the objection that it belongs only to the Administrator, in addition to which we have at least two cases—and then of course we have the Glick Bros. case, holding that the Administrator cannot bring the action—in addition to which we have other cases, two or three other [109] cases, where retailers were involved, and each holding that the Administrator has the right of action but using exactly the line of reasoning that excludes the Administrator in this case, and I don't think they will have an array of authorities that anywhere near touches that. So we say that the Administrator does not have the cause of action.

Now we come back to where I said I was; that is, if he does have a cause of action, is this document here in some way violated? And I take it that there is not any contention here. I haven't gone over the other documents. I understand the rule to be that where they file a complaint and a pre-trial order saying that this is the particular

regulation we violated, that I don't need to look at all other regulations. This covers machines and parts, and machinery services, and it says that only the machines, that is the term of machines. Parts means and is limited to products falling within the groups listed within Section 1390.32, Appendix A, and 1390.33, Appendix B; so we go back and search through Appendix A and Appendix B and see if we can find this machine there. I will have to admit that I had a very hard time until I was enlightened by my friends. This is under several headings, and the first is prime movers, under head "(a) Prime Movers." I said to myself, "Well, a tractor must be a prime mover," and so I look in there and I find Diesel engines and gasoline engines for [110] tractors, and Diesel engines for aircraft, but I didn't find tractors.

Then I look in industrial and marine power apparatus, and I said, "Well, a tractor might be an industrial power apparatus," and I could not find it there.

"Processing machinery and equipment," but I could not find it there.

Then the next heading was "Construction and Mining Machinery," and I said, "Well, certainly it is not there."

So I omitted that and went on, and one day tractors were not mentioned, and then it was called to my attention that it is under the one they are claiming. They haven't made this in their argument but I understand *they* will be their argu-

ments—that it is listed under "Construction and Mining Machinery."

Well, tractors can be used, I suppose, and are used, as part of construction machinery, but when most of us think of tractors we think of machines that are used for other things, but under "Construction and Mining Machinery" is listed crawler and nonagricultural tractors. Well, there is no testimony in this case that this is an agricultural tractor or is not an agricultural tractor, except testimony that it was bought from a farmer, that the farmer had had it on his farm and it was adaptable to being used on a farm. Of course I will admit that the expression crawler and non- [111] agricultural tractors is subject to two constructions. It might be subject to the construction crawler tractors or nonagricultural tractors, or it might be subject to the construction crawler or nonagricultural tractors. You have to judge it both times in order to find out what it means, but it seems to me that where they have put this type of a machine under the heading of construction and mining machinery, and have said simply crawler and nonagricultural tractors, we won't have a tractor to be within this type of construction of mining machinery. It must be both a crawler tractor and a nonagricultural tractor, and in this particular case I think it can well be said to be a crawler agricultural tractor because it was a tractor that was used on a farm and was adaptable to being used on a farm and was purchased, and there is no evidence in the case, generally speaking, as distinguishing between

what was an agricultural tractor and a nonagricultural tractor. If I may say so, the general thought on the subject is this: That almost any kind of a tractor can be, and almost any kind of a tractor is used for agricultural purposes today from the very smallest to the very biggest.

Then there is another point here in which I think their language is very ambiguous, and I have my doubts if it applies to this case, and that is they have a group of sections, 1390.2, subdivision (f) is one of the sections. [112]

"Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof." Of course, so far I don't think there will be any contentions that we fall within that definition, because we are not a manufacturer.

"For the purpose of this exclusion, a sale or delivery is deemed to be 'at retail' when made to an ultimate consumer, other than an industrial, commercial, or Governmental user."

Well, we are not a Governmental user. I don't think it can be said we are a commercial user, and the question is whether we are an industrial user, and I will have to admit that in some senses logging use is an industrial use. In fact, I think that we can say that the word "industry" and also the word "commerce," either of them used alone, embraces a lot of territory, and when you say "industry" and you don't in any way modify it, you expect it to cover just about everything that people work at other than the provision for a livelihood. But while it has that broad

meaning it also has the more narrow meaning, and when you use the word "industry" along with the word "commercial," it is clear that the word "industry" does not include "commercial" and the word "commercial" does not include "industry," and it has rather a narrow meaning then and it must be given its narrow meaning, just generally understood, to be the processing of food in factories where a large amount of capital and labor is used. [113]

I have one case here, for instance—it is not an OPA or anything of that kind, but it illustrates this point, and it is State Ex Rel v. Smith, 111 S.W. (2d) 513. This was an action to determine whether or not a certain tax was applicable to a street railway company. It was an electricity tax, and the statute provided that the tax should be upon the use of the electricity for commercial or industrial purposes. Now I would say that running a streetcar system is just as much an industry as running a logging establishment, and yet the Court held that it didn't apply there; if the word "industry" alone had been used, they said it had a broad connotation, but when they put the two in there it showed it was intended to be used in its narrow meaning.

The Court said: "Industrial establishment connotes a place of business which employs much labor and capital and is a distinct branch of trade," citing Webster's Dictionary; and, therefore, that if they had wanted to use it in this particular sense they would have used a broader term, and they gave

examples of broader terms, which I can't recall, but industrial, commercial or occupational, or things of that kind.

And in another case, which has nothing to do with this subject, but, nevertheless, they refer to it, North Whittier Citrus Association v. National Labor Relations Board, 109 Fed (2d) 76. They define "Industrial activity commonly [114] means the treatment or processing of raw products in factories." So it would seem here, if they intended to cover this type of a case, they would have defined retail a little different than they did here, industrial, commercial or Governmental. If a man uses it, buys it, I mean, an industrial or commercial user, but if a farmer buys it, even though a small farmer, he is an industrial or commercial user.

Well, for those reasons, first, I don't say this language covers it. Second, because if there is a cause of action it is not in the Administrator; and, third, because when we consider the price of the most nearly comparable item and add to it the spares—there is no evidence as to the lowest price of these spares that were therein and not except certain new ones that were on there—when we add these things that this man didn't violate the ceiling.

I am not going to discuss at length the question that your Honor will not reach, unless you find there was a violation and the Administrator has the right to. I think your Honor is satisfied if there was one it was in good faith and without any

consciousness on his part that he was violating a ceiling. It so happens that while he and the man from Allis-Chalmers reached the same point they did it by different methods. That is, he didn't take this new machine; he took the old machine; but he thought that the 55 per cent was applicable, not to the price in the East but [115] to the price at which it was sold in Eastern Oregon, and he roughly computed 55 per cent of that but at the appropriate price for the new things put in, and his labor. So if he did that it was well within bounds, and if your Honor should come to that point I am sure your Honor will agree with me it can't be anything except a good faith violation.

Mr. Wagner: In connection with the question he has a cause of action, your Honor, I really didn't feel as though there was any question about that in this case at all. The result is I haven't done any exhaustive search on it, such as counsel here has. Some of those cases I am familiar with. Some of the decisions that he has quoted I am not. However, I will say that there was for some period of time during the early stages of price control some question as to the language that has been used in this section of the Act, but I think that now concurrently there is practically no question about it in the minds of any of the Courts.

The Glick case is the only case of its kind. There the Court held that the Administrator was confined in his cause of action only to the operations or sales of the black market type, and that I know of

no decision that has ever followed it. A number of the decisions have but I don't believe that any of the decisions have followed the Glick case, and it of course is on appeal.

The Seminole Rock Company case, which counsel cited, [116] I am familiar with, where the question concerned gravel, the purchase of gravel, I believe, by a railroad company, which actually used and consumed the gravel in its operations of maintaining its roadbed, and the Court there held that the use was one of ultimate use and consumption. I believe that that case is on appeal, too, your Honor.

My feeling about the thing is that we are entirely governed by the language of the statute, that the words "for use or consumption other than in the course of trade or business," means personal use or consumption; that is, any use or consumption that is for anything other than personal use, would give the cause of action to the Administrator. The uses in the course of trade or business are the Administrator's causes and they are for the ultimate use or consumption as the personal use or consumption gives the person a right of action, and I think that is the rule which many of the cases have followed which counsel has cited. The Chew case is an example of that. There the use was for a personal use or consumption.

Now there are cases where there is a question about that. For example, a filling station operator has purchased a pair of overalls to use where he is working at the filling station and employed

by the operator. Is that purchase of the overalls one for personal use or consumption, or is it in the course of his trade or business? I feel that in this [117] kind of situations, where there is a question, or there is a possible question, as to whether it is in one or the other, that the use or consumption, the immediate use or consumption is that which should govern, and that where he urges they are to run for the protection of the body, that the cause of action should lie in the purchaser there.

That is true also for example, with people who travel in connection with their business and they rent a hotel room. It is in the course of their business, and maybe they have an expense account which they charge their employers with. Is the privilege of sleeping in that room one for personal use or consumption, or is it in the course of trade or business?

Well, I think there that the immediate use is one for personal comfort; that the hotel room is used by the person himself; that he, therefore, should have the cause of action.

That can be applied to food, too. Where a person is eating and traveling for some concern, is the food to keep him alive and to keep him going? Is that used in the course of trade and business of that concern, or is it for personal use or consumption? And I don't think that there should be any question about those situations. They are matters of impersonal use or consumption and the pur-

chaser should have the cause of action in those cases, without question. [118]

Now there are a number of cases here that have considered that language of the Act. One is Tropp v. Great Atlantic & Pacific Tea Company, where the purchases were at retail—or where the purchases were at wholesale, and the Court holding, reading from the headnote, "The purchaser may not recover treble damages for payments made in excess of ceiling prices where the commodity is not purchased for use or consumption," following the wording of the statute.

Another case is Bowles v. Empire Packing Company, concerning the ceiling above. Reading from the headnote here:

"The action for treble damages under the Act may be brought by a purchaser only where he buys the commodity for use or consumption other than in the course of trade or business. Where these conditions are not met only the Administrator may bring such an action."

Another case is Bowles v. Curtis Candy Company, where the purchase was the sugar for use in making the candy, and the Court holding that under the Act the Administrator is entitled to sue for the penalties prescribed therein where sales are made in violation of the Act were made in the course of trade or business, the purchaser being denied the right to sue under such circumstances.

And in Bowles v. Occident, Northern District of California, decision by Judge Goodman, holding that where [119] the defendant had sold meat

at prices of meat regulations the Administration was entitled to recover treble damages where the purchase was not for personal use or consumption.

More particularly, Bowles v. Silverman, involving a sale of equipment to a farmer, in the U. S. District Court for the District of South Dakota, decided March 9th, 1944, the Court holding, reading a little bit from the opinion. The Court quotes this section of the statute and says this:

"The wording of the statute, it seems to me, leaves no room for doubt that if the purchases involved here were made for use or consumption in the course of trade or business of the respective purchasers, the Administrator is exclusively authorized to bring this suit"; holding that a purchase by a farmer of equipment for use on his farm activities was in the course of trade or business.

Bowles v. Sieff is another case, U. S. District Court for the District of Minnesota.

Mr. Jaureguy: What is the name?

Mr. Wagner: Bowles v. Sieff, May 4th, 1944.

Mr. Jaureguy: You don't have the citation?

Mr. Wagner: No. It is Civil No. 7050. If you ever want to use this book it is in 1 Opinions and Decisions, Office of Price Administration, at page 1320, involving the sale of new rubber tires and tubes to dealers, holding that the use or consumption must be other than the course [120] of trade or business if the purchaser would have the cause of action.

And likewise, in Bowles v. Denunzio; that is the Western District of Kentucky, May 13, 1944, in-

volving sales of citrus fruits and certain vegetables, holding that the sales, being for other than personal use or consumption, the Administrator had the right of action.

Now all of those cases are on the well settled principles that the use or consumption must be for personal use or consumption in order for the purchaser of the commodity to have a cause of action, and if the Court is interested in that question any further I will be very, very happy to exhaust the authorities on it. Those are all that I have here with me.

Now in connection with the question as to whether or not the regulation applies, I don't think there is any question about it. Counsel, in referring to the definition of a retail sale, or a sale at retail, is not taking into account the fact that that provision is put in the regulation for the specific purpose of classifications of sales of other commodities. The regulation is either an inclusive one and covers such things as nuts, and bolts, and some items that approach the hardware stage, and those sales at retail are governed by various provisions of the regulation and the definition is in there for that purpose, not for the [121] purpose of confusing this particular sale as to whether or not it is in the course of trade or business, or as to whether or not this sale is within the regulation.

I think counsel very definitely stated that crawler type tractors are within the regulation. I think he virtually concedes it. And then the evidence certainly discloses that this is a crawler type tractor.

Ordinarily a farm tractor is a wheel tractor. I think it is a matter of common knowledge, and the tractors are so classified by the Office of Price Administration, and farm tractors ordinarily have wheels on them and it is the industrials that ordinarily do have the crawlers on. However, there are a lot of crawler tractors being used by farmers; we all know that; and just because of the fact that the trade has classified them one way and that classification has been followed by the office in fixing the prices, I would say had no bearing whatsoever on whether or not a particular tractor is within or without the regulation. As to the sale itself, if the Court feels that the gasoline, or the ignition type of oil burner of October, as the evidence disclosed as the comparable type of equipment, the most nearly comparable type of equipment by which the price of this particular machine should be gaged, it certainly can use that price, and if it decides that the new price of a full Diesel is the more comparable it certainly can use that price in arriving at the price. [122]

We have brought forth the evidence. We feel that the most nearly comparable is the one. If the Court feels it is the other way, of course the Court can make its decision accordingly. We are giving, of course, full credit for the two pieces of equipment that the evidence discloses were attached to the machine.

In connection with the other matters that the defendant has sought to introduce here, I don't believe that the Court should in any way consider

that in arriving at the price. In the matter this guarantee here is a very logical thing. If there is an express guarantee, and if all of the worn or missing component parts of this machine have been replaced, I see no reason why a guarantee should not be forthcoming. The fact of the matter is, and the evidence discloses, that the machine wasn't in a workable condition. It would not perform and it didn't perform, and it had to be repaired, and the man was left without any recourse against the seller on the basis of a guarantee. He had nothing there to look back to the seller for in exacting or extracting the particular price that he did. The evidence of repairs date back to a year previous to the time of sale. They were intermittent repairs, and naturally a heavy piece of equipment, in doing the load, in doing the work that it was made to do, would necessitate a whole lot of repairs and I believe just not because of the fact that the regulation [123] excludes the consideration of that evidence alone but because looking at the thing from the purely logical standpoint I don't think that evidence should be considered at all.

Going to the regulation, however, the price that is accorded the machine is dependent upon there being an express and a binding guaranty, and in this case it is conceded, admittedly so, that there was none.

We feel, in conclusion, that regardless of which machine is found by the Court to be the most comparable with the fact that there was no guarantee, and that the buyer had no recourse whatsoever,

should relegate the price to the 55 per cent price of whichever machine the Court finds is the most comparable.

The Court: What did you say back there about ten minutes ago, about the two pieces of equipment that were attached to it?

Mr. Wagner: What are they?

(Mr. Joy and Mr. Wagner here conversed in undertone.)

Mr. Wagner: There was an armor guard bumper, and a bull or pull guard. The armor guard is recorded at the price of $85.00, and I believe there was testimony to that effect. The testimony on the hook was—was it $17.50?

(Mr. Joy here conversed with Mr. Wagner in an undertone.) [124]

Mr. Wagner: Well, we originally conceded that it had a value of $25.00, and we will certainly be willing to go that far with the thing. That was an original concession. That was made at the time I believe that this matter was first called to Mr. Joy's attention, and we are willing that that be the price to apply to that.

The Court: How does that enter into the calculation?

Mr. Wagner: Well, it is in addition to the comparable new price, so that it would be an addition to the $4240, of which total 55 per cent should be ceiling price. Is it forty-two fifty or forty-two forty?

Mr. Joy: Forty-two forty.

Mr. Wagner: Of the full Diesel?

Mr. Jaureguy: Forty-two fifty. What about these 18-inch shoes that you had testimony on, $295.00?

Mr. Wagner: These are merely replacement parts, as far as I am concerned.

Mr. Jaureguy: The original was—don't take this.

Mr. Wagner: I don't know. Was there some testimony on it?

Mr. Jaureguy: $295.

Mr. Wagner: Over and above the cost of the 15-inch standard shoes?

Mr. Jaureguy: That is all he said. You asked him what it would cost, and he said $295. [125]

Mr. Wagner: Well, I think that the burden would be upon you, if there was any. We are not conceding—we are taking the position that replacement parts that were purchased for this machine are not to be allowed as extras. Now if there are any parts that should be regarded as extras, why, I certainly think the defendant has the burden of showing that. We have shown everything that—we are willing to concede the $25.00, because of an original admission, although the testimony was $17.50, I think.

The Court: I have to reserve decision because it is new to me, and if you want to add anything to what you have said, Mr. Wagner, you may send it to me by mail right away. You didn't say whether—you said you had always taken it for

granted that there was no question, but under facts like this that the Administrator was a proper party plaintiff. Did you mean by that that you are not familiar, for instance, with these two cases that Mr. Jaureguy cited? He cited one tractor case and cited one farmer case, which seemed to be pat cases.

Mr. Wagner: No. I am not familiar with the farmer case that he cited. I would like to have opportunity to look at it.

The Court: All right.

Mr. Jaureguy: I don't like to say this but of course it was in the pre-trial order. This question was involved, and [126] Mr. Joy and I discussed it twice, and we explained each other's theories, and I gave him the cases I had at that time. I think it is just a case where my friend, Mr. Wagner, just came into this case, when he was, however, there, and he wasn't prepared for that, which is all right, but I don't want the impression to be gotten—I don't think it is deliberate; I know it is not deliberate—the impression to be gotten that I haven't given full disclosure at the pre-trial of what I was going to contend. I gave quite a talk here. It may not have been intelligible, but it was explained to Mr. Joy afterwards.

The Court: I know that.

Mr. Jaureguy: I wonder if I may say one more word? That is, he cited a lot of cases. I tried to follow them. If I followed them correctly, there was only one case that was like this case. All the rest of the cases, of course, stated good law under my

theory, and there was only one case where somebody used it all which they used in connection with some occupation where they thought there could be a cause of action by the Administrator.

The Court: Now, you see, nearly always it seems there is one Government Agency which is the major litigant in this court. A few years ago there were four or five hundred war risk cases pending here, and right now the OPA is the major litigant, numerically I think with thirty or forty pending [127] OPA cases, where they appear as plaintiff in nearly all, and with which I am charged in the division of the calendar with responsibility. That means the Government is nearly always in those fields that are being extensively litigated. It has one or more people specializing in that field. So Mr. Wagner said that he had never understood there was any authority, such as you have cited and argued. Working all the time in that field, that caught my attention. He didn't mean—I don't mean to say he didn't mean you had taken anybody by surprise. He meant that he as head Enforcement Attorney here—I really forced him into this case—had never heard of these cases. If he hadn't I want him to get familiar with them, because I want his views on them, because the point you raise——

Mr. Jaureguy: You might dismiss a lot of these.

The Court: I don't know how serious it is, now that the statute has been amended, but the point of course is a serious point. Who has the first right

to sue now under the amendment for the first thirty days?

Mr. Wagner: In situations where the use or consumption is other than in the course of trade or business the purchaser there has the right to sue for the first thirty days.

The Court: He has the thirty-day right?

Mr. Wagner: Yes. Then of course the cause is, your Honor, one having a dual right either in the purchaser or [128] the Administrator.

Mr. Jaureguy: An action by the Administrator would bar the purchaser. A judgment in favor of either, again I would say, would also bar the Administrator. I think it would work both ways.

The Court: Alva, will you gather everything up and keep it overnight? All right, Gentlemen. Thank you.

(Thereupon the foregoing hearing was concluded at 5:20 o'clock P.M.) [129]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had upon the trial of the case of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, v. L. G. Trullinger, Defendant, Civil No. 2403, on Monday, November 13, 1944, before the Honorable Claude

McColloch, Judge; that I thereafter prepared a transcript from my shorthand notes so taken, and the foregoing and hereto attached 123 pages, numbered 7 to 12,, both inclusive, contains a full, true and correct record of all of the evidence given and proceedings had upon said hearing.

Dated at Portland, Oregon, this 3rd day of March, A. D. 1945.

ALVA W. PERSON
Court Reporter [130]

[Endorsed]: No. 11013. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. L. G. Trullinger, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 21, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 11013

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

v.

L. G. TRULLINGER,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. That the District Court erred in failing to find as a fact that the defendant sold to Earl Gilmore and the said Earl Gilmore purchased from the defendant for use or consumption in the course of trade or business a tractor and other personal property subject to Maximum Price Regulation No. 136 at a price in excess of the maximum permitted by said regulation for said tractor and other personal property.

2. That the District Court erred in finding as a fact that the said Earl Gilmore purchased said tractor and other personal property from defendant otherwise than for use and consumption in the course of trade or business.

3. That the District Court erred in concluding

as a matter of law that the right of action arising as the result of the sale of said tractor and other personal property to the said Earl Gilmore at a price in excess of that permitted by said Maximum Price Regulation No. 136 was not vested in the appellant.

4. That the District Court erred in holding that the sale of said tractor and other personal property was not covered or governed by said Maximum Price Regulation No. 136.

5. That the District Court erred in failing to hold that the sale of tractor and other personal property was covered and governed by said Maximum Price Regulation No. 136.

6. That the District Court erred in finding that the price at which said tractor and other personal property was sold by the defendant to said Earl Gilmore, to wit, $2800.00, was not in excess of the maximum price permitted by said Maximum Price Regulation 136.

7. That the District Court erred in concluding as a matter of law that the said defendant had not violated said regulation by making said sale.

8. That the District Court erred in concluding as a matter of law that the defendant was entitled to judgment and that appellant was not entilted to recover.

9. That the District Court erred in dismissing the action.

10. That the District Court erred in failing to

grant judgment in favor of appellant in accordance with the prayer of complaint on file herein.

HERBERT H. BENT
Acting Regional Litigation Attorney
F. E. WAGNER
District Enforcement Attorney
Attorneys for the Appellant

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT
Acting Regional Litigation Attorney
F. E. WAGNER
District Enforcement Attorney
Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

The parties hereto having by stipulation so agreed it is now by the Court

Ordered: That in printing the transcript herein the Court omit Exhibits No. 2 and No. 3 in the Court below, but that said exhibits may be considered by this Court on this appeal as fully as though printed.

Dated: June 12, 1945.

FRANCIS A. GARRECHT
Circuit Judge

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the above entitled parties by and through their respective attorneys that defendant's exhibits numbered 2 and 3 may be omitted from the printed record or transcript on appeal herein but that said exhibits may still be considered by the Court as a part of the record on said appeal.

In accord with the Designation of Record herein on file, all exhibits will be contained in said printed record on appeal, save and except as hereinabove indicated they be omitted.

HERBERT H. BENT
F. E. WAGNER
Of Attorneys for Appellant
NICHOLAS JAUREGUY
Of Attorneys for Appellee

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.